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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

STEPHEN WOLK and HELEN J. WOLK,

Petitioners,

v.

ORANGE COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. ARE SECTIONS 162.07 AND 162.09, FLORIDA STATUTES (AND THEIR PROGENY OF LOCAL GOVERNMENT ORDINANCES PATTERNED AFTER THEM SUCH AS SECTION 11-35 AND 11-37, ORANGE COUNTY CODE), UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, FOR PURPORTING TO PROVIDE THAT ADMINISTRATIVE FINES FOR ALLEGEDLY HAVING FAILED TO COMPLY WITH AN ORDER OF A CODE ENFORCEMENT BOARD MAY BE IMPOSED ON A RESPONDENT PROPERTY OWNER AND A LIEN FOR SAME IMPOSED ON THAT OWNER'S PROPERTY WITHOUT NOTICE TO THE PROPERTY OWNER AND HEARING, BASED SOLELY ON THE EX PARTE AFFIDAVITS OF CODE INSPECTORS?

2. DO THE ALLEGATIONS OF THE COMPLAINT IN THE INSTANT ACTION THAT THE CODE ENFORCEMENT BOARD OF ORANGE COUNTY, FLORIDA, IMPOSED A FINE FOR ALLEGED CODE ENFORCEMENT VIOLATIONS ON THE PETITIONERS AND IMPOSED A LIEN FOR SAME ON ALL OF THEIR PROPERTY BY THE PROCEDURE ESTABLISHED IN SECTIONS 162.07 AND 162.09, FLORIDA STATUTES (AND SECTION 11-35 AND 11-37, ORANGE COUNTY CODE) WITHOUT NOTICE TO THE PETITIONERS AND HEARING ADEQUATELY STATE A VIOLATION OF A CONSTITUTIONAL RIGHT OF THE PETITIONERS SUFFICIENT TO ESTABLISH THE "VIOLATION OF A CONSTITUTIONAL RIGHT"

ELEMENT OF A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983?

3. DO THE ALLEGATIONS OF THE COMPLAINT IN THE INSTANT ACTION THAT CODE ENFORCEMENT INSPECTORS OF ORANGE COUNTY, FLORIDA, ACTING IN THAT CAPACITY, REFUSED TO ACKNOWLEDGE THE PETITIONERS' COMPLIANCE WITH AN ORDER OF THE CODE ENFORCEMENT BOARD OF ORANGE COUNTY, FLORIDA, AND FILED A FALSE AFFIDAVIT WITH THAT BOARD STATING THAT THE PETITIONERS HAD NOT COMPLIED WITH THAT ORDER SO AS TO CAUSE A FALSE JUDGMENT AND LIEN FOR CODE ENFORCEMENT FINES TO BE ENTERED AGAINST THE PETITIONERS ADEQUATELY STATE A VIOLATION OF A CONSTITUTIONAL RIGHT OF THE PETITIONERS SUFFICIENT TO ESTABLISH THE "VIOLATION OF A CONSTITUTIONAL RIGHT" ELEMENT OF A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983?

LIST OF ALL PARTIES IN LOWER COURT

A list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed herein, listed alphabetically, is as follows:

Terry W. Boston;

Beverly M. Boyer;

Mark A. Chernega;

George L. Dorsett;

State of Florida (as *amicus curiae*);

Edward J. Fox, Jr.;

Edward A. Frenk;

Joel D. Hammock;

Ronald Hill;

W. Robert Humble;

Mary Kaschai;

Daniel F. Martzaris;

Orange County, Florida;

Orange County, Florida Code Enforcement Board;

Joseph Perkins;

Melvin Pittman;

Jim Powers;

Marlene Reilly (as Personal Representative of the Estate of Joseph James Reilly);

W. Steven Rodgers;

Helen J. Wolk;

Stephen Wolk;

Jimmy Wrye; and

Fran H. Wyatt;

A corporate disclosure statement is not required herein per Rule 29.6 of the Rules of the Supreme Court of the United States[1] because there is no petitioner herein that is a nongovernmental corporation.

[1] All references to rules in this petition are to the Rules of the Supreme Court of the United States, and therefore will be made hereinafter by reference to the number of the rule only, *e.g.*, "Rule 29.6".

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OPINIONS BELOW

The United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit advise that none of the orders entered relative to the instant case was submitted for publication at either the district court or circuit court level. Apparently, everything that was done by either of these courts with regard to this matter was done by non-published opinions, and therefore there are no citations of official or unofficial reports of the opinions and orders entered by the lower courts herein.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order sought to be reviewed herein on November 18, 2003 (Appendix A). This order affirmed per curiam, and thus adopted and ratified, the more expansive order of the United States District Court for the Middle District of Florida entered on December 5, 2002 upholding the constitutionality of the statutory and ordinance provisions at issue and dismissing the petitioners' case for failure to state a cause of action under 42 U.S.C. §1983. (Appendix B). Petitioners timely filed a Petition for Rehearing by the Court En Banc which was denied by the United States Court of Appeals for the Eleventh Circuit on February 10, 2004. (Appendix C). The jurisdiction of this Court to review the order here sought to be reviewed by writ of certiorari is invoked pursuant to 28 U.S.C. §1254(1).

28 U.S.C §2403(b) may apply to this proceeding. The United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. §2403(b), certified to the Attorney General of the State of Florida the fact that the constitutionality of a statute of the State of Florida was drawn into question. Petitioners have notified the Attorney General of the State of Florida of this fact as required by Rule 29.4(c).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

United States Constitution, Amendment V, in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1, in pertinent part:

> Section. 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes Sections 162.06, 162.07, and 162.09, in pertinent parts:

> **162.06 Enforcement procedure.-**
>
> (1) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes; however, no member of a board shall have the power to initiate such enforcement proceedings.
>
> (2) Except as provided in sub-sections (3) and (4), if a violation of the codes is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue

beyond the time specified for correction, the code inspector shall notify an enforcement board and request a hearing. ...

162.07 Conduct of hearing.-

(3) An enforcement board shall proceed to hear the cases on the agenda for that day. ...

(4) At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted herein. ... The order may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under §162.09(1), the cost of repairs may be included along with the fine if the order is not complied with by said date. ...

162.09 Administrative fines; costs of repair; liens.-

(1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time ..., may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the enforcement board for compliance .... If a finding of a violation ... has been made as provided in this part, a hearing shall not be necessary for issuance of the order imposing the fine. If, after due notice and hearing, a code enforcement board finds a violation to be irreparable or irreversible in nature, it may

order the violator to pay a fine as specified in paragraph (2)(a).

(2)(a) A fine imposed pursuant to this section shall not exceed $250 per day for a first violation and shall not exceed $500 per day for a repeat violation, and, in addition, may include all costs of repairs pursuant to subsection (1). However, if a code enforcement board finds the violation to be irreparable or irreversible in nature, it may impose a fine not to exceed $5,000 per violation.

...

(3) A certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator ....

Sections 11-34, 11-35, and 11-37 of the ordinances of Orange County, Florida, set forth in Chapter 11 of the Orange County Code, in pertinent parts:

Sec. 11-34. Enforcement procedure.

(a) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes and ordinances. No member of the code enforcement board shall have the power to initiate such enforcement proceedings.

(b) Except as provided in sub-sections (c) and (d), if a violation of the codes or ordinances is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation.

Should the violation continue beyond the time specified for correction, the code inspector shall notify the code enforcement board and request a hearing. ...

Sec. 11-35. Conduct of hearing.

(c) The code enforcement board shall proceed to hear the cases on the agenda for that day....

...

(f) At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted by this chapter. ... The order may include a notice that it must be complied with by a specified date and that a fine may be imposed, and under the conditions as specified in section 11-34(d), the cost of repairs may be included along with the fine if the order is not complied with by such date.

Sec. 11-37. Administrative fines; costs of repair; liens.

(a) The code enforcement board, upon notification by the code inspector that an order of the code enforcement board has not been complied with by the set time ..., may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the code enforcement board for compliance ....
If a finding of a violation ... has been made as provided in this article, a hearing shall not be necessary for issuance of the order imposing

the fine. If, after due notice and hearing, the code enforcement board finds a violation to be irreparable or irreversible in nature, it may order the violator to pay a fine as specified in subsection 11-37(b).

(b) A fine imposed pursuant to this section shall not exceed two hundred fifty dollars ($250.00) per day for a first violation and shall not exceed five hundred dollars ($500.00) per day for a repeat violation and, in addition, may include all costs of repairs pursuant to subsection 11-37(a). However, if the code enforcement board finds the violation to be irreparable or irreversible in nature, it may impose a fine not to exceed five thousand dollars ($5,000) per violation.

...

(c) A certified copy of an order imposing a fine may be recorded in the public records of the county and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator. ....

STATEMENT OF THE CASE

The State of Florida has enacted a procedure by which local governments within the state can enforce codes (building, safety, zoning, etc.) in Chapter 162, Fla. Stat.[1], and provided that units of local government within the state may adopt that procedure for code enforcement within their jurisdictions. §162.03(1), FS. Respondent ORANGE COUNTY, FLORIDA (hereinafter, "the COUNTY") has adopted the procedure set forth in that chapter in its code

[1] Hereinafter, citations to the Florida Statutes will be designated by a section mark and number and the abbreviation "FS", *e.g.*, "§162.09, FS".

enforcement ordinance, Chapter 11 of the Orange County Code[2], §11-27, OCC, the procedures of which are drawn from and are almost identical to those of the State statute.

Essentially, the referenced statute and ordinance establish a scheme for code enforcement in which, after an observed violation of a code has gone uncorrected for an initial warning period, the code inspector noting the violation calls for a hearing before the Code Enforcement Board of the COUNTY (hereinafter, "the CEB")[3] to determine the existence of the violation and to enforce compliance.[4] At this hearing, the CEB typically issues an order finding that the violation asserted by the code inspector exists, setting a date by which the owner of the property must correct the violation, and providing in advance for a fine on the property owner in a specified daily amount, usually the $250.00-a-day maximum, for each day after the date set for compliance until the violation is corrected.[5]

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[2] Hereinafter, citations to the Orange County Code will be designated by a section mark and number and the abbreviation "OCC", *e.g.*, "§11-37, OCC". The provisions of the Orange County ordinance relating to "code enforcement", §11-1, *et seq.*, OCC (hereinafter, "the ordinance"), are drawn from and largely parallel the provisions of the state act, Fla. Stat. §162.01, *et seq.*, (hereinafter, "the statute") (§11-27, OCC). Therefore, hereinafter, the scheme set forth for "code enforcement" in the statute and that set forth in the ordinance will be referred to collectively as "the code enforcement scheme " or "the scheme", and footnotes and parenthetical references following will specify both the provisions of the statute and the ordinance pursuant to which the action alleged could be said to have been taken.

[3] §162.06(2), FS; §11-34(b), OCC.

[4] §162.07, FS; §11-35, OCC.

[5] §162.07(4), FS; §11-35(f), OCC. Since the events of this case, this statute has now been amended to provide, as of October 1, 1999, for a maximum fine of an absurd $1,000.00 a day (§162.09(d), FS), and Orange County has adopted this increased maximum. §11-37(b), OCC, amended per Ord. No. 2002-10 §5, effective August 13, 2002.

This hearing is the last hearing that the property owner gets as of right under the code enforcement scheme. Incredibly, both the statute and the corresponding COUNTY ordinance provide in terms that no hearing is necessary relative to the imposition of fines on the property owner for ostensibly having failed to correct the violation within the time allotted and the imposition of a lien on all of his property for the amount of the fines. §162.09(1), (3), FS, in pertinent part (to the same effect, §11-37(a), (c), OCC):

> (1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time ..., may order the violator to pay a fine in an amount specified in this section [per diem fine of up to $250.00 per day. §162.09(2)(a), FS] for each day the violation continues past the date set by the enforcement board for compliance .... If a finding of a violation ... has been made as provided in this part, *a hearing shall not be necessary for issuance of the order imposing the fine.* ....
>
> ...
>
> (3) A certified copy of an *order imposing a fine may be recorded in the public records* and thereafter shall constitute a *lien against* the land on which the violation exists and upon *any* other real or personal *property owned by the violator.* ...[Emphases added.].

Instead, the critical determination of whether or not such measures as the property owner may have taken as of the expiration of the time for his compliance under the CEB's order have in fact constituted "compliance" with that order, which in turn determines if the property owner is liable for fines, is left to a process of submission of unilateral, ex parte

affidavits by the COUNTY's code inspector. If, as of the expiration of the period for compliance, the inspector feels that the property owner has (in the vernacular of the COUNTY) "achieved compliance", in theory, the code inspector is supposed to give the owner an "affidavit of compliance" acknowledging his compliance with the CEB's order, but there is no compulsory process provided in the scheme by which the owner can compel the inspector to give him this affidavit, regardless of what the owner may have done to the property. If, on the other hand, as of the expiration of the period for compliance, the inspector feels that the property owner has not achieved compliance (or if, as alleged in the instant case, he just does not for reasons of his own want to give the affidavit of compliance to the property owner), the inspector files a conclusory affidavit stating only that the owner has not complied with the CEB's order, termed an "affidavit of non-compliance"[6], with the CEB.[7]

Immediately upon receipt of the affidavit from the inspector stating that the owner has not complied with its order, with no further inquiry into the accuracy of the inspector's conclusions contained in the affidavit, the CEB

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[6] *See, e.g.*, "Exhibit I" to complaint (R1-10-Ex. I (Throughout this petition, petitioners will avail themselves of the license granted in Rule 12.7 to cite to the lower court record although not yet transmitted to this Court. Citations to the lower court record herein are made with reference to the docket sheet for this case as developed by the United States District Court for the Middle District of Florida and consist of a sequence of three or four numbers or groups of numbers separated by hyphens wherein the first, preceded by "R", refers to the volume of the record in which the cited material is found, the second refers to the document number assigned by the court to the document in which the cited material is found, the third refers to the page number or numbers of that document on which the cited material is found, and the fourth, if there is one, wherein the number(s) are preceded by the "¶" symbol, refers to the number(s) of the paragraphs of that document on the pages referenced in which the cited material appears.)).

[7] §162.09(1), FS; §11-37(a), OCC.

summarily issues an order imposing a fine on the owner in the full amount of the daily fine specified in the initial order multiplied by the number of days that have elapsed since the deadline for compliance set in the order, and causes this order to be recorded in the public records.[8] After its recordation, the order creates a lien for the full amount of the fines indicated to be owed thereby that attaches to all property of the owner, real and personal, and which, after three months from the date of its recordation, can be foreclosed by the COUNTY against any or all such property.[9] At no point under the scheme, either before or after the order imposing the fines issues or is recorded as a lien against his property, is the property owner afforded a hearing, or even any means of communicating with the CEB, as to either the propriety of the inspector's conclusions stated in the affidavit of non-compliance, or even whether he is actually guilty of the offense for which the fines are ostensibly imposed.

In summer 1996, a dispute arose between petitioners and a fire inspector for the COUNTY named TERRY BOSTON (hereinafter, "BOSTON") as to the requirements of the fire code relative to an apartment property that the petitioners owned ("the building") that resulted in ill will between BOSTON and the petitioners (R1-10-11-¶19).[10] Acting under the code enforcement scheme, on August 8, 1996, BOSTON called in agencies of the State and the electrical department of the COUNTY in order to cite additional "code violations" in the building (R1-10-11, 12-¶20). On August 9, 1996, two COUNTY electrical inspectors, JOSEPH . JAMES REILLY (hereinafter, "REILLY") and EDWARD A. FRENK (hereinafter,

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[8] §162.09(1), FS; §11-37(a), OCC.

[9] §162.09 (3), FS; §11-37(c), OCC.

[10] Following each fact stated herein is a citation in parenthesis in the manner described in footnote 7, *supra*, to the allegation of the same matter in petitioners' original amended complaint hereinafter mentioned.

"FRENK"), issued a citation against the plaintiffs for alleged violations of the electrical code in the building (R1-10-12-¶22).

On November 20, 1996, REILLY obtained from the CEB, at a hearing pursuant to §11-35, OCC (§162.07, FS), that he had initiated, an order requiring the petitioners to correct the alleged violations of the electrical code in the property by December 4, 1996, and providing for a fine of $250.00 a day for each day after that date that the violations remained uncorrected if they failed to do so (hereinafter, "the CEB's order"; R1-10-13-¶¶24, 25, 26, 27). The petitioners through a contractor caused the work required by the CEB's order to be done by the December 4, 1996 deadline (R1-10-14-¶29). REILLY and FRENK, however, refused to acknowledge this and issue an affidavit of compliance relative to the work on three separate occasions – on December 4, 1996 (R1-10-15-¶30), December 9, 1996 (R1-10-15-¶35), and January 13, 1997 (R1-10-16-¶40) – and instead on those occasions issued additional citations requiring additional work that they purported needed to be done in order to satisfy the CEB's order (R1-10-15-17-¶¶30, 31, 32, 33, 35, 36, 37, 38, 40, 41, 42, 43, 44). On the last of these occasions on January 13, 1997, the citation that REILLY issued included a requirement of work that was clearly outside the scope of the work that the CEB had ordered – that the petitioners replace all of the electrical panels in the building – as a condition of obtaining an affidavit of compliance from REILLY (R1-10-17-¶44). Because of the inclusion of the requirement of work that was clearly extraneous to the work required in the order that the CEB had issued, the petitioners refused to comply with this citation (R1-10-17-¶45).

On February 7, 1997, REILLY filed an affidavit with the CEB pursuant to §11-37(a), OCC (§162.09(1), FS), stating conclusorily that "the corrective action ordered by the Board [in the CEB's order] had not been taken" (R1-10-18-¶46). In response to this affidavit, on March 19, 1997, the

CEB issued an order imposing a fine on the plaintiffs of $250.00 a day for each day from December 4, 1996 that "the violation continue[d]"[11] and, on April 7, 1997, caused this order to be recorded in the public records of Orange County, Florida as a lien against the petitioners' property pursuant to §11-37(a), OCC (§162.09(1), FS), by the procedure specified in §11-37 (§162.09, FS), all with no notice to the petitioners or hearing (R1-10-18-¶¶47, 48, 49, 50). Because the scheme provided for no hearing on the propriety of imposing fines based on this affidavit, the petitioners were deprived of any means of showing the CEB that what they had supposedly "not complied with" was far afield from what the CEB had ordered, and was in fact the unilateral and unauthorized creation of the COUNTY's code inspector, REILLY.

There then ensued a period of some seven years dating to the present day wherein the petitioners struggled with the adverse effects of the putative lien for code enforcement fines recorded against their property and suffered financial damage as alleged in the complaint as a result of the impediment to the use of their property posed by the apparent lien (R1-10-35-¶91(c), (d)). During this period, their efforts to have the situation rectified were met by either studied indifference or a rush to buttress the position of the code inspectors on the part of REILLY's and FRENK's supervisors (R1-10-20-¶51), the CEB and its counsel, and all others connected with the code enforcement scheme (R1-10-20, 21, 23, 24, 25, 26-¶¶52, 53, 54, 55, 64, 65, 66, 67, 68, 71, 72).

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[11] Although the amount of the fine imposed by this order was not known at the time of its issuance since at that time it it was not known how long it would be that the "violation", in the COUNTY's view, would continue, the amount of the fine claimed by the COUNTY pursuant to this order was ultimately liquidated at $182,000.00 when, on December 3, 1998, a different inspector requiring entirely different work in order to comply with the order pursuant to an entirely different citation issued on June 22, 1998, finally submitted an affidavit attesting to the petitioners' compliance with the order (R1-10-21-¶¶56, 57, 58, 59, 60).

The petitioners filed their original complaint and an amended complaint (R1-10; hereinafter, "the complaint") in the instant case for recovery of damages resulting from violations of their constitutional rights committed by the defendants under color of state law, a declaration that the statutes and ordinances pursuant to which these actions were taken – in particular, Sections 162-07 and 162.09, FS, and Sections 11-35 and 11-37, OCC (hereinafter, collectively, "the provisions") – are unconstitutional, and an injunction against their continued enforcement, brought pursuant to 42 U.S.C §1983, in the United States District Court for the Middle District of Florida (hereinafter, "the District Court") on February 2, 2001 and May 24, 2001, respectively. In addition to the allegations of the specific facts recited above, the complaint alleged a conspiracy on the part of the three code inspectors for the COUNTY – BOSTON, REILLY, and FRENK – to exploit the known procedural defects in the code enforcement scheme to inflict financial damage on the petitioners by contriving the entry and recordation of a false and void judgment of liability for code enforcement fines against them by withholding an affidavit of compliance from the petitioners regardless of what they did. (R1-10-12-¶21). Federal jurisdiction was founded in the District Court based on the existence of federal question(s) pursuant to 28 U.S.C. §§1331 and 1343.

Respondents filed motions to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a cause of action on June 15, 2001 (R2-28) and June 18, 2001 (R2-31), in response to which the petitioners timely filed oppositions. On November 5, 2002, the District Court entered an order dismissing the complaint (R3-68-43) based on findings that the provisions were not unconstitutional and that, therefore, the complaint failed to allege the violation of a constitutional right of the petitioners necessary to support an action under 42 U.S.C. §1983 (R3-68-3, 29; Appendix B). On November 18, 2003, a three-judge panel of The United States Court of Appeals for the Eleventh Circuit (hereinafter,

"the Appellate Court") affirmed this order of the District Court "per curiam", without an opinion (Appendix A). Petitioners timely filed on December 9, 2003 a Petition for Rehearing En Banc relative to this ruling, which was denied by the Appellate Court on February 10, 2004 (Appendix C).

REASONS FOR ALLOWANCE OF WRIT

I. THE INSTANT DECISION HOLDING SECTIONS 162.07 AND 162.09, FLA. STAT. (SECTIONS 11-35 AND 11-37, ORANGE COUNTY CODE) CONSTITUTIONAL CONFLICTS WITH NOT ONE DECISION OF THIS COURT, BUT WITH THE ENTIRE LINE OF THIS COURT'S DECISIONS ON PROCEDURAL DUE PROCESS, AND ALSO WITH THAT OF THE FLORIDA STATE COURT OF LAST RESORT, IN THAT IT SUSTAINS THE DISTRICT COURT IN HOLDING THAT A PROPERTY INTEREST WITHIN THE PROTECTION OF THE FIFTH AND FOURTEENTH AMENDMENTS MAY BE DIVESTED WITH NO NOTICE AND HEARING WHATSOEVER, AND THAT STATUTES AND ORDINANCES PROVIDING FOR SUCH DEPRIVATION BY A PROCESS OF UNILATERAL SUBMISSION OF EX PARTE AFFIDAVITS ARE NOT UNCONSTITUTIONAL.

Perhaps the *sine qua non* of certiorari jurisdiction is the maintenance of uniformity of decisions by preventing the aberrant decision's attaining the status of precedent. *See* considerations governing review on certiorari, Rule 10. This Court has consistently interpreted the Fifth Amendment[12]

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[12] As all references to constitutional amendments in this petition are to the Amendments to the Constitution of the United States, references to the Amendments to the Federal Constitution hereinafter will be made by

guarantee against deprivation of property without due process of law to require, at a minimum, notice and hearing before a property interest within the protection of the Fifth Amendment may be divested, and has consistently struck down state statutes purporting to provide for the deprivation of such interests upon less as violative of the Fourteenth Amendment. *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (A statute or ordinance that purports to permit the deprivation of a property right protected under the constitution upon procedures less stringent than those required by due process is unconstitutional.); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (statutes providing for prejudgment taking of possession of money by wage garnishment without prior notice and hearing unconstitutional); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) (statutes providing for prejudgment execution of vendor's lien without prior notice and hearing unconstitutional); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (statutes providing for prejudgment taking of possession of property by replevin without prior notice and hearing unconstitutional); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (statutes providing for prejudgment taking of possession of money by wage garnishment without prior notice and hearing unconstitutional). With respect to the hearing that due process requires before government may divest a person of such an interest, since the formulization of the test of the sufficiency of the hearing provided to satisfy the requirements of due process in *Mathews v. Eldridge*, 424 U.S. 319 (1976), while this Court has sanctioned hearings upon written submissions where circumstances dictate, *Mathews*, *supra*, at 347, and post-deprivation hearings where circumstances dictate, *City of Los Angeles v. David*, 538 U.S. ___, 155 L.Ed. 2d 946 at 949 (2003), this Court has never deviated from the position that *some* form of hearing is

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reference to the number of the Amendment only, *e.g.*, "the Fifth Amendment."

required before a person may be deprived of a property interest within constitutional protection. *Goss v. Lopez*, 419 U.S. 565, 579 (1975):

> At the very minimum, therefore, [persons] facing ... interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing. [Emphases theirs.];

Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982):

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest. [Citation omitted; emphasis theirs.]

Mathews, *supra*, at 333:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.

In particular, this Court has consistently held any procedure purporting to substitute, for the hearing otherwise required by procedural due process, a procedure wherein a determination is made based on the submission of ex parte affidavits by one party to a dispute to be inadequate under the *Mathews* analysis. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Connecticut v. Doehr*, 501 U.S. 1 (1991). In *Good*, it was held that a procedure that allowed the federal government summary seizure of real

property based solely on the ex parte submission of affidavits of drug enforcement agents that probable cause for such seizure existed was unconstitutional as violating the rights of the owner of the property to procedural due process under the *Mathews* analysis. 510 U.S. 43, at 62. In *Doehr*, it was held that a statute that purported to provide for the imposition of an attachment on real property based solely upon the ex parte submission of an affidavit of the plaintiff in a civil action stating that he had good cause to believe that he would prevail in the action was unconstitutional as violating the rights of the owner of the property to procedural due process under the *Mathews* analysis. 501 U.S. 1, at 16. At the heart of both decisions was the acknowledgment that any procedure effected by a document representing one party's one-sided, uncontested version of the facts in question, without allowing the other party to the dispute an opportunity to be heard, inherently gave rise to, under the second element of the *Mathews* analysis – the "risk of an erroneous deprivation under the procedures in place" – a likelihood of error at levels that were prohibitive. In this regard, both decisions quoted the oft-quoted passage from *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172 (1951), stating:

> The likelihood of error that results illustrates that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' [Citation omitted.] *Good*, *supra*, 510 U.S. at 56; *Doehr*, *supra*, 501 U.S. at 13-14.

Similarly, the Supreme Court of Florida has held the practice of determining rights within the protection of the Fifth and Fourteenth Amendments on the basis of the

submission of ex parte affidavits to be constitutionally deficient under the *Mathews* analysis. In *County of Pasco v. Riehl*, 635 So.2d 17 (Fla. 1994), the Florida Supreme Court affirmed and virtually adopted intact a decision of the Court of Appeals sustaining the striking down of an ordinance of Pasco County that allowed a dog to be classified as a "dangerous dog", subject to much greater restrictions in its ownership, upon the filing by any person of an affidavit that he or she had been attacked by the dog. No opportunity was given the dog's owner in the ordinance for a hearing or other input into the classification. In striking this ordinance as unconstitutionally abridging the requirements of procedural due process, the Court of Appeals for the Second District of Florida stated that the determination as to the sufficiency of such hearing as may have been provided to satisfy the requirements of procedural due process required consideration of the three *Matthews* factors, which it quoted in the opinion with citation to the case, but the court then went on to say:

> However, where there is no opportunity for a hearing whatsoever, prior to (or even after) substantial restrictions and penalties are placed upon the owner's use and enjoyment of his property, the statute on its face and in its operation, constitutes an unconstitutional denial of due process." *County of Pasco v. Riehl*, 620 So.2d 229, 231 (Fla. 2nd DCA 1993).

The statutes and ordinances in question, Sections 162.07 and 162.09, FS, and Sections 11-35 and 11-37, OCC, purport to provide for the determination of whether a property owner has timely complied with an order of the CEB, and therefore whether that property owner is liable for administrative fines in often huge amounts, to be made based solely on the unilateral, ex parte affidavits of code inspectors

of the COUNTY. Not only is the property owner not provided a hearing at any point in the code enforcement scheme as to the issue of his compliance with the order or lack thereof, at no point in the scheme is he even afforded a means of communicating with the CEB as to his compliance with their order, either before or after the order imposing fines issues and is recorded as a lien against all his property. §162.09(3), FS; §11-37(c), OCC.

It is established that the right to hold real estate free of the interference posed by encumbrances such as liens is a property right within the protection of the Fifth and Fourteenth Amendments. *Doehr*, *supra*, 501 U.S. at 12:

> ... [O]ur cases show that even the temporary or partial impairments to property rights that attachments, *liens*, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with *liens*, 'are subject to the strictures of due process.' [Emphases added.]

Thus, it becomes apparent that the statutes and ordinances in question purport to provide for nothing less than the deprivation of a property right within the protection of the Constitution, *by their terms* without notice and hearing, on the basis of what? The ex parte submission of affidavits by code inspectors for the COUNTY. These provisions are thus in blatant disregard of the entire line of precedents regarding procedural due process as developed to this point by this Court and concurred by the Florida Supreme Court, and the order(s) here under review sustaining them are in glaring departure from literally the entire body of federal and state law discussed above. Certiorari should therefore be granted to prevent the inconsistency of precedent that would otherwise result.

II. THE SUBJECT DECISION HOLDING THAT THE ALLEGATIONS OF THE INSTANT COMPLAINT THAT THE CEB ENTERED A JUDGMENT OF LIABILITY FOR ADMINISTRATIVE FINES AND RECORDED IT AS A LIEN AGAINST PETITIONERS WITHOUT NOTICE AND HEARING BY THE PROCEDURE ESTABLISHED UNDER SECTIONS 162.07 AND 162.09, FLA. STAT. (SECTIONS 11-35 AND 11-37, ORANGE COUNTY CODE), DID NOT VIOLATE A CONSTITUTIONAL RIGHT OF THE PETITIONERS SUFFICIENT TO SUPPORT A CAUSE OF ACTION UNDER 42 U.S.C §1983 CONFLICTS WITH DECISIONS OF THIS COURT, AND DIRECTLY COUNTERMANDS THE HOLDING OF THE HIGHEST STATE COURT YET TO RULE ON THIS ISSUE.

The order here sought review affirms, and thus adopts and ratifies, the District Court's holding that the allegations of the instant complaint that the CEB entered an order imposing fines on the petitioners and a lien on their property without notice to the petitioners or hearing pursuant to the procedure established in the code enforcement scheme (R1-10-18-¶¶47, 48, 50) do not allege a violation of a constitutional right of the petitioners sufficient to support a cause of action under 42 U.S.C. §1983 (R3-68-3, 29). This holding is in direct conflict with this Court's holding in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). In *Peralta*, it was held that "... [U]nder our cases, a judgment entered without notice or service is constitutionally infirm", 485 U.S. 80, at 84, and therefore the entry of a judgment without notice and hearing constitutes a violation of procedural due process under the Fifth and Fourteenth Amendments.

Moreover, the subject holding also completely disregards the fact that the highest court of the State of Florida to have ruled on the issue of whether the entry of an

order of liability for fines for code enforcement violations without notice to the respondent and hearing by the procedure specified in §§162.07 and 162.09, FS, violates the constitutional rights of the respondents squarely held that the entry of such an order by these procedures *did* constitute a violation of the constitutional rights of the respondents to procedural due process. *Massey v. Charlotte County*, 842 So.2d 142 (Fla. 2nd DCA 2003). The facts of *Massey* were so similar to those of the instant case as to perhaps justify discussion at some length.

On July 5, 2000, the code enforcement board for Charlotte County, Florida (hereinafter, "the CCCEB") held a hearing under §162.07, FS, at which it found the Masseys to be in violation of the building code. 842 So.2d at 143. This is analogous to the CEB's hearing of November 20, 1996 in the instant case at which the petitioners were found to be in violation of the electrical code (R1-10-13, 14-¶¶26, 28). On July 11, 2000, the CCCEB issued an order pursuant to §162.07(4), FS, holding the Masseys in violation of the building code, requiring them to remedy the violation within 30 days, and providing for a fine on the Masseys of $100.00 per day for each day thereafter that the violation continued if they failed to do so. 842 So.2d at 143-144. This is analogous to the CEB's order of November 20, 1996 in the instant case holding the petitioners in violation of the electrical code, requiring them to remedy the violations within 14 days, and providing for a fine on the petitioners of $250.00 per day for each day thereafter that the violation continued if they failed to do so. (R1-10-14-¶28). On November 13, 2000, a Charlotte County code inspector submitted an "affidavit of non-compliance" averring that the Masseys had not complied with the CCCEB's July 11, 2000 order to the CCCEB pursuant to §162.09(1), FS. 842 So.2d at 144. This is analogous to the February 7, 1997 submission by code inspector REILLY of an "affidavit of non-compliance" in the instant case averring that the petitioners had not complied with the CEB's November 20, 1996 order

(R1-10-18-¶46). On January 4, 2001, the CCCEB entered an order imposing a fine and lien on the Masseys pursuant to §162.09(1), FS, based solely on the affidavit of the code inspector, without notice to the Masseys or hearing. 842 So.2d at 144. This is analogous to the CEB's entry in the instant case of its order of March 19, 1997 imposing a fine and lien on the petitioners based solely on REILLY's affidavit, without notice to the petitioners or hearing. (R1-10-18, 19-¶¶47, 48, 49). As in the instant case (R1-10-13, 14, 15, 16 -¶¶23, 29, 34, 39), in *Massey* the respondents had made some efforts at compliance prior to the entry of the order imposing a fine and lien on them, thus raising an issue as to whether compliance had been achieved. *Id.*

The Masseys appealed the CCCEB's order imposing a fine on them to the state circuit court in which they argued, as do the petitioners in the instant case, that the order was void by virtue of having been entered without notice to them and hearing. *Id.* Upon affirmance of that order by the circuit court, the Masseys petitioned the District Court of Appeals for the Second District of Florida for a writ of certiorari quashing the circuit court's order.

Stating that the issue for decision in the case was "whether additional process was due to the Masseys either before or after the [CCCEB] ordered the imposition of the fines and lien" (842 So.2d at 146), the court of appeals held that the entry by the CCCEB of the order imposing fines and a lien on the Masseys without notice and hearing under the procedure prescribed by §162.09(1), FS, violated the Masseys' constitutional right to procedural due process. 842 So.2d at 147. Central to the court's decision was its finding under the analytical framework of *Mathews v. Eldridge*, *supra*, that nowhere in the entire procedural history of the case developed under the code enforcement scheme of Chapter 162, FS, were the Masseys afforded any opportunity to challenge the CCCEB's findings as to what the court termed the "moderately complex issues" peculiar to the imposition of fines/liens under the code enforcement scheme:

> ... [T]here remains a serious risk of an erroneous deprivation [in entry of the order imposing fines and lien without notice and hearing] because the amount of fines imposed and the propriety of the lien depended upon factual findings that the Masseys were never given an opportunity to protest. These findings involved moderately complex issues, including whether the alleged violation continued, how long it continued, and whether there was any reason to reduce the per diem fine imposed in light of attempts by the Masseys to comply. To remedy the risk of improper seizure, there must be some type of procedure to allow the property owner to address these new findings. [Citing *County of Pasco v. Riehl*, 620 So.2d 229 (Fla. 2d DCA 1993), discussed *supra* at p. 18]. *Id.*

Thus, the Appellate Court's affirmance of the District Court's holding in the instant case that allegations of entry of a judgment and lien for alleged code enforcement fines against the petitioners without notice and hearing did not state the violation of a constitutional right of the petitioners is in conflict with not only decisions of this Court, but with that of a Florida State court directly on point as well.

III. THE SUBJECT DECISION HOLDING THAT THE ALLEGATIONS OF THE COMPLAINT THAT EMPLOYEES OF THE COUNTY ACTING UNDER THE AUSPICES OF AUTHORITY THAT THEY HELD BY VIRTUE OF STATE LAW DID ACTS ILLEGAL UNDER STATE LAW DID NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C §1983 ALSO CONFLICTS WITH DECISIONS OF THIS COURT.

The order here sought review affirms, and thus adopts and ratifies, the District Court's holding that the allegations of the instant complaint fail to allege the violation of a constitutional right of the plaintiffs sufficient to support a cause of action under 42 U.S.C. §1983 on any basis (R3-68-3, 29). This holding is in direct conflict with this Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961). In *Monroe*, it was established that deprivations actionable under 42 U.S.C. §1983 include those effected by violations by state officials of local law that is constitutional - i.e., by "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law", 365 U.S. 167, at 184, as well as by enforcement of local law that is unconstitutional.

It is axiomatic that in evaluating the sufficiency of a complaint as against a motion to dismiss,

> ... [The] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The complaint in the instant action alleges that the three inspectors of the COUNTY, on several occasions improperly refused to acknowledge the compliance by the petitioners with the CEB's order (R1-10-15, 16-¶¶30, 35, 40), and ultimately filed a false affidavit with the CEB that triggered the entry of the false judgment for code enforcement fines against the petitioners. (R1-10-18-¶46). These are all acts in abuse of the authority that the inspectors held by virtue of state law, and therefore, under *Monroe*, the allegations of these acts in the complaint should have been held sufficient to state a cause of action under 42 U.S.C. §1983, irrespective of whether the provisions of the code enforcement scheme discussed above were constitutional or not.

CONCLUSION

The orders of the Court of Appeals and the District Court conflicting with the great weight of authority on each of the points above, the petitioners respectfully request this Court issue a writ of certiorari to review the order of the Court of Appeals for the Eleventh Circuit affirming the order of the District Court for the Middle District of Florida as to which review is sought herein.

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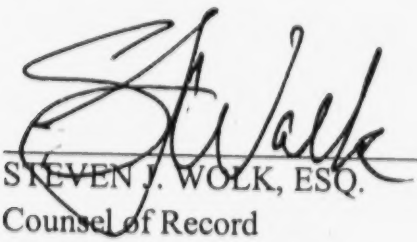
DATED: May 3, 2004

Respectfully submitted,



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APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITES STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 18 2003
THOMAS K. KAHN
CLERK

No. 02-16662

D. C. Docket No. 01-00141-CV-ORL-6-28DAB

STEPHEN WOLK,
HELEN J. WOLK,

Plaintiffs-Appellants,

versus

ORANGE COUNTY, FLORIDA,
a political subdivision of the State of Florida,
TERRY W. BOSTON, individually, et al.,

Defendants-Appellees,

ATTORNEY GENERAL OF FLORIDA,

Intervenor.

Appeal from the United States District Court
for the Middle District ofFlorida

(November 18, 2003)

Before BLACK and HULL, Circuit Judges, and. GOLDBERG*, Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.1[1]

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

[1] 11th Cir.R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on fmdings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

FILED

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STEPHEN WOLK and HELEN J. WOLK,

Plaintiffs,

-vs- **Case No. 6:01-cv-141-Orl-28DAB**

ORANGE COUNTY , FLORIDA, et al.,

Defendants.

ORDER

In this action brought pursuant to 42 U.S.C. § 1983, Plaintiffs Stephen and Helen Wolk ("the Wolks") seek relief from various orders entered by the Orange County Code Enforcement Board involving real property owned by the Wolks. The Wolks primarily contend that the statutory and code provisions pursuant to which the orders were entered are unconstitutional on various grounds. The Defendants include Orange County, several individual Orange County officials, an assistant County Attorney, several members of the Code Enforcement Board, and counsel for the Code Enforcement Board.

In their Amended Complaint (Doc. 10), the Wolks allege seven counts: in Count I, the Wolks seek, against all

Defendants, damages under § 1983 for deprivation of civil rights; in Count II, the Wolks seek vacation of allegedly void orders entered by the Code Enforcement Board; in Count III, the Wolks seek injunctive relief and a declaratory judgment that Section 162.09{1), Florida Statutes, and Section 11-37(a) of the Orange County Code are unconstitutional as violative of procedural due process under the Fifth and Fourteenth Amendments; in Count IV, the Wolks seek injunctive relief and a declaratory judgment that Sections 162.07 and 162.09, Florida Statutes, and Sections 11-35 and 11-37 of the Orange County Code are unconstitutional as violative of substantive due process under the Fifth and Fourteenth Amendments; in Count V, the Wolks seek injunctive relief and a declaratory judgment that Sections 162.01-.13, Florida Statutes, are unconstitutional as violative of the rights to trial by jury and to confront witnesses under the Sixth and Fourteenth Amendments; in Count VI, the Wolks seek injunctive relief and a declaratory judgment that Section 162.09{1), Florida Statutes, and Section 11-37{a) of the Orange County Code are unconstitutional as providing for excessive fines in violation of the Eighth and Fourteenth Amendments; and in Count VII, the Wolks seek injunctive relief and a declaratory judgment that Section 162.09{2), Florida Statutes, and Section 11-37{b) of the Orange County Code are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

This cause is currently before the Court on the Motion to Dismiss and Motion to Strike Amended Complaint {Doc. 28) filed by Defendants W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran Wyatt, W. Steven Rodgers, Jim Powers, Beverly Boyer, Joel Hammock, Mark Chernega, Daniel Mantzaris, and Drage, DeBeaubien, Knight, Simmons, Mantzaris & Neal, P.A. {"DDKSMN") (hereinafter collectively "the Code Enforcement Board Defendants), and the Motion to Dismiss Pursuant to Rule 12(b){6) and Rule 8{a), Federal Rules of Civil Procedure (Doc. 31) filed by Defendants Orange County, Terry Boston,

Marlene Reilly, Edward Frenk, Edward Fox, Jr., Melvin Pittman, and George Dorsett (hereinafter "the County Defendants").[1] Upon consideration, and as more specifically set forth below, because the Court finds the code enforcement scheme to be constitutionally sound the Defendants' motions shall be granted and this case shall be dismissed.

I. Motion to Dismiss Standards

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). At the motion-to-dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands. Inc., 187 F.3d 1271, 1273 n.1 (11th Cir.1999) (citing Hawthorne v. Mac Adjustment. Inc., 140 F.3d 1367, 1370 (11th Cir. 1998)). However, "[a]s a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a

[1]In addition to the motions themselves (Docs. 28 & 31), the following record documents relate to these motions: the Orange County Defendants' Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8(a), Federal Rules of Civil Procedure (Doc. 32); Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss and to Strike Amended Complaint of the Code Enforcement Board Defendants (Doc. 33); Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss of the Orange County Defendants (Doc. 34); the Orange County Defendants' Responsive Brief to the Court's April 5, 2002 Request Therefor (Doc. 48); the Code Enforcement Board Defendants' Response to Court Order Requesting Additional Briefing (Doc. 50); Attorney General's Memorandum of Law as Amicus Curiae in Support of Constitutionality of Chapter 162, Fla. Stat. (Doc. 47); Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motions to Dismiss Complaint (Doc. 49); and Defendants' Notice of Filing Supplemental Authority Regarding Constitutionality of Fla. Stat. Chapter 162 (Doc. 60).

motion to dismiss." S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 408 n.10 (11th Cir. 1996) (citing Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)). In ruling on a motion to dismiss, "'the court limits its consideration to the pleadings and exhibits attached thereto.'" Grossman v. NationsBank, N.A, 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting GSW, Inc. v. Long County, 999 F.2d 1508, 1510 (11th Cir.1993)); see also Brooks v. Blue Cross & Blue Shield of Fla.; Inc., 116 F.3d 1364, 1368 (11th Cir. 1997) ("[T]he analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto.").

II. Factual Allegations of the Amended Complaint

The following facts are taken from the allegations of the Plaintiffs in their Amended Complaint (Doc. 10) and from the attachments thereto. Of course, at this stage of the case, the court makes no findings as to the truth or legitimacy of these allegations.

The Wolks own the "Dubsdread Apartments" (hereinafter "the building" or "the property") at 401 Niblick Avenue, Orlando, within the unincorporated area of Orange County. On August 8, 1996, an argument arose between a fire code inspector, Defendant Terry Boston, and Steven Wolk[2] over the property's compliance with the fire code. The argument culminated in Boston contacting other regutatory agencies for an investigation of other potential violations of the Orange County Code ("OCC").

On August 8 and 9, 1996, Boston allegedly conspired with electrical inspectors - Defendants Joseph Reilly and Edward Frenk - to exploit Orange County's code enforcement scheme to financially harm the Wolks. After causing an initial Code Enforcement Board compliance order to be

[2]Steven Wolk is the counsel of record in this case and is the son of Plaintiffs Stephen and Helen Wolk.

issued against the Wolks,[3] the inspectors allegedly planned to find violations regardless of the Wolks' remedial actions. Thereafter, they would file false affidavits[4] attesting to the Wolks' failure to comply, pursuant to which the Code Enforcement Board would invoke a per diem fine and lien against the property.[5] All of the subsequent acts allegedly done by these Defendants were in furtherance of this plan.

On August 9, 1996, Reilly and Frenk claimed to have found electrical code violations on the property and issued a citation (Doc. 10, Ex. B) (hereinafter "the original citation") requiring correction by August 26, 1996. The Wolks allegedly corrected the violations within the required time frame, but on September 3, 1996, Reilly and Frenk claimed to find the work inadequate. (Doc. 10, Ex. C). On September 24, 1996, Reilly filed a request for a Code Enforcement Board hearing.[6]

After notice was given to the Wolks, the Code Enforcement Board conducted a hearing[7] on November 20, 1996 and entered an order (Doc. 10, Ex. E) (hereinafter the "compliance order") finding that the violations noted in the statement of violation existed at the property. The compliance order required correction by December 4, 1996, and notified the Wolks that failure to cure by that date would result in the imposition of a $250 fine charged each day after December 4 that the violations remained uncorrected. The

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[3]Pursuant to Section 11-35(f), OCC, and Section 162.07(4), Florida Statutes.

[4]Pursuant to Section 11-37(a), OCC, and Section 162.09(1), Florida Statutes.

[5]Pursuant to Section 11-37, OCC, and Section 162.09, Florida Statutes.

[6]Pursuant to Section 11-34(b), OCC, and Section 162.06(2), Florida Statutes.

[7]Pursuant to Section 11-35, OCC, and Section 162.07, Florida Statutes.

compliance order directed the Wolks "to contact the Code Enforcement Officer bringing this violation to arrange for an inspection of the property to verify compliance with this Order." {Doc. 10, Ex. E at 2). The compliance order also indicated that the Code Enforcement Board had found "that the violation presents a serious threat to the public health, safety, and welfare" and that therefore a copy of the order was being sent to Orange County. {Doc. 10, Ex. E at 2).

Through completion of additional work, the Wolks remedied the conditions noted in the compliance order, but on December 4, 1996, Frenk issued another citation {Doc.10, Ex. F) purporting to require completion of additional work as a condition to satisfaction of the compliance order. The Wolks performed the additional work, but on December 9, 1996, Reilly issued another citation {Doc. 10, Ex. G) again purporting to require further work as another condition to the compliance order. The Wolks completed additional work to remedy the conditions noted in the December 9, 1996 citation, but on January 13, 1997, Reilly issued another inspection notice {Doc. 10, Ex. H) listing other violations. including a requirement of replacing all of the building's electrical panels.

On January 15, 1997, the Wolks informed Reilly of their refusal to perform the additional work noted in the January 13 citation. On February 7, 1997, Reilly filed an Affidavit of Non-Compliance[8] {Doc. 10, Ex. I) wherein he stated that the Wolks had attempted but not completed corrective action. Based on Reilly's Affidavit of Non-Compliance, on March 19, 1997 the Code Enforcement Board issued an "Order Imposing Administrative Fine/Lien"[9] (Doc. 10, Ex. J) (hereinafter the "fine/lien imposition order")

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[8]Pursuant to Section 11-37{a), OCC, and Section 162.09{1), Florida Statutes.

[9]Pursuant to Section 11-37(a), OCC, and Section 162.09(1), Florida Statutes.

finding that the Wolks had not complied with the compliance order and imposing a $250 per diem fine beginning December 4, 1996. On April 7, 1997, the Code Enforcement Board filed the fine/lien imposition order in the public records of Orange County, thereby[10] officially placing a lien on the Wolks' property.

On April 11 and 14, 1997, Steven Wolk disclosed the alleged misconduct of Reilly and Frenk to their immediate supervisor, Defendant Edward Fox. Fox stated that he and the County ratified and endorsed the actions of Reilly and Frenk. On April 16, 1997, Steven Wolk brought before the Code Enforcement Board, on the Wolks' behalf, a motion to vacate[11] (Doc. 10, Ex. K) the fine/lien imposition order on grounds that it was fraudulently procured. On the advice of Defendant Mantzaris, the Code Enforcement Board refused to afford the Wolks a hearing on the motion to vacate and dispersed.

At the Wolks' request, on June 22, 1998[12] the County conducted an inspection of the property through electrical inspector Vern Ogden, who is not a defendant in this action. Ogden issued a citation (Doc. 10, Ex. L) setting forth additional work as a condition to the compliance order different from that designated by Reilly and Frenk and minus the electrical panel replacement requirement. After the Wolks performed his cited additional work, Ogden filed an Affidavit of Compliance with the Code Enforcement Board on December 3, 1998 documenting the Wolks' satisfaction of the compliance order.

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[10]Pursuant to Section 11-37(c), OCC, and Section 162.09(3), Florida Statutes.

[11]The motion to vacate had previously been served on each Code Enforcement Board member, Code Enforcement Board attorney Daniel Mantzaris, DDKSMN, and Assistant County Attorney George Dorsett.

[12]The Complaint does not describe any events between April 16, 1997 and June 22 1998.

The County calculated the $250 per diem fine from December 4, 1996, to December 3, 1998, and it totalled $182,000. On January 20, 1999, another owner of the property, Gina Wolk, brought before the Code Enforcement Board a motion to reduce the fine. On that date, the Code Enforcement Board held a hearing on the motion to reduce the fine and issued an order (Doc. 10, Ex. M) (hereinafter the "fine reduction order") reducing the fine from $182,000 to $100,000. In making its determination, the Code Enforcement Board heard allegedly "unsworn, false testimony" from Defendant Assistant County Attorney George Dorsett that the County had spent $182,000 on the subject enforcement case. (Doc. 10 at 23).

The Wolks filed a motion to vacate (Doc. 10, Ex. N) both the fine/lien imposition order and the fine reduction order, and the Code Enforcement Board convened for a hearing on March 15 and April 19, 2000 to consider that motion. The motion alleged that the fine/lien imposition order was void because it had been entered in spite of a failure to satisfy the notice and hearing requirements of due process. At the hearing on the motion to vacate, Dorsett argued on behalf of Orange County that the Code Enforcement Board's November 20, 1996 hearing satisfied the due process notice and hearing requirements for issuance of the fine/lien imposition order. The Code Enforcement Board followed Defendant Mantzaris's legal advice to deny the motion to vacate.

The Wolks appealed the January 1999 fine reduction order to the state circuit court for Florida's Ninth Judicial Circuit. On January 8, 2001, the circuit court entered an order (Doc. 10, Ex. O} finding the $100,000 fine to be excessive. That order states in part:

> At the hearing on [Gina Wolk's motion to reduce the fine], the Board, Mr. Dorsett, Ms. Wolk and her attorney discussed the past difficulties with Appellants in completing the

> corrections. There was also a general consensus that Mr. Wolk had made this entire case more difficult than it had to be and that he failed to cooperate. The Board considered the expense incurred by the county , including attorney's fees, as well as the rents earned by Appellants while the property was not in compliance. Ms. Wolk asked the Board to disregard her co-owners' prior conduct and rely on her representations that she would work with the County and that she would make every effort to remain in compliance. Ms. Wolk also asked the Board to consider the fact that it might end up managing the property itself if it did not work with her. The Board granted Ms. Wolk's request but only reduced the fine by $82,000.00. The $250.00 per day fine imposed upon Petitioners, that mushroomed into a $182,000.00 fine, was excessive and confiscatory. The Court finds, based upon the record presented, that a reduction of that fine by only $82,000.00 was an abuse of discretion.

(Doc. 10, Ex. O at 3) (footnote omitted). The-circuit court remanded the matter to the Code Enforcement Board to further consider reduction of the fine. (Doc. 10, Ex. 0 at 4).

On February 21, 2001, the Code Enforcement Board held a hearing to reconsider the motion to reduce the fine pursuant to the circuit court's direction. During that hearing, the Wolks renewed their April 1997 motion to vacate and argued that the Board's orders had been entered without due process. On March 1, 2001, the Board issued an order (Doc. 10, Ex. P) reducing the-fine to $10,000 as well as an order (Doc. 10, Ex. Q) denying the Wolks' motion to vacate the fine/lien imposition order.

Based on these allegations, the Wolks filed the present action as well as a parallel action in state court, which has been stayed.

III. Analysis

Each of the motions of the two groups of Defendants raise several arguments for dismissal, some of which overlap.[13] The contentions raised can be combined and reduced to five arguments, each of which will be addressed in turn. First, the Defendants contend this case should be dismissed in deference to a pending action in Florida state

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[13]In their motion (Doc. 28), the Code Enforcement Board Defendants first argue that they enjoy either absolute or qualified immunity from the Wolks' suit. Second, they contend that the Wolks' suit is barred by Florida's bar and merger rules as well as by the Wolks' failure to make a Jennings reservation. Third, these Defendants assert that the Wolks have failed to exhaust their state court remedies. Fourth, Defendants Mantzaris and DDKSMN argue that the Amended Complaint fails to state a cause of action against them because they were acting within their role as attorneys at times relevant to the Amended Complaint. Fifth, the Code Enforcement Board Defendants contend that the Amended Complaint fails to state a cause of action because the statutory provisions at issue are constitutionally sound and provide due process. Finally, these Defendants move to strike the Wolks' claim for punitive damages based on section 768.72, Florida Statutes.

In their motion to dismiss and supporting memorandum (Docs. 31 and 32), the County Defendants contend that the first, third, fourth, fifth, sixth, and seventh causes of action in the Amended Complaint are time-barred. Second, they aver that the claims against Defendants Boston, Reilly, Frenk, Fox, Pittman, and Dorsett in their individual capacities should be dismissed based on qualified immunity or other defenses. Third, these Defendants argue that the Amended Complaint fails to state a cause of action for a violation of 42 U.S.C. §1983 because the Wolks have failed to set forth a right of which they have been deprived. Fourth, the Orange County Defendants argue that the Amended Complaint fails to state a cause of action because the statutory provisions at issue are constitutionally sound and provide due process. Fifth, these Defendants contend that this Court should dismiss this action in favor of a state court action filed by the Wolks. Finally, these Defendants argue that the Wolks' claims for punitive damages should be dismissed pursuant to section 768.72, Florida Statutes.

court. Second, the Defendants argue that the statutory and code provisions at issue are facially constitutional. Although the Court finds this second argument dispositive, the Court will also address the Defendants' contentions that the Amended Complaint fails to state a § 1983 claim and that they are entitled to absolute or qualified immunity. Fourth, Defendants aver that the Wolks' claims are barred by the statute of limitations. Lastly, the Defendants argue that the Wolks' claims for punitive damages should be dismissed.

A. Motion to Dismiss in Deference to a Pending State Court Action

The Orange County Defendants ask this court to dismiss the present action filed on February 2, 2001 in deference to an almost identical action brought by the Wolks four days later in Florida state court, which has been stayed. In considering this issue, the court applies the principles set forth by the Supreme Court in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), and Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). See also TranSouth Fin. Corp. v. Bell, 149 F.3d 1292 (11th Cir. 1998); First Franklin Fin. Corp. v. McCollum, 144 F.3d 1362 (11th Cir. 1998); Am. Bankers Ins. Co. of Fla. v. First State Ins. Co., 891 F.2d 882 (11th Cir. 1990); Noonan South, Inc. v. County of Volusia, 841 F.2d 380 (11th Cir. 1988).

In Colorado River, the Supreme Court held that a federal court may dismiss an action because of parallel state court litigation in exceptional circumstances, noting:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a

> controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

424 U.S. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)). The Colorado River decision provided four factors to consider in determining whether exceptional circumstances exist: 1) whether one of the courts has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the potential for piecemeal litigation; and 4) the order in which the forums obtained jurisdiction. Id. at 818. In Moses H. Cone, the Supreme Court repeated these four factors and added two more: 5) whether state or federal law will be applied; and 6) the adequacy of the state court to protect the parties' rights. Moses H. Cone, 460 U.S. at 23, 26. The Moses H. Cone Court also noted that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." Id. at 16. Applying the principles set forth in Colorado River and Moses H. Cone to the facts of the present action, dismissal is not warranted.

The first Colorado River factor weighs in favor of dismissal because the Wolks have placed $10,000 in the registry of the state court. This factor, however, is entitled to minimal weight in the overall balancing of factors.

With respect to the second factor - relating to inconvenience of the federal forum - the federal district court is no less convenient than Florida's Ninth Judicial.Circuit. In fact, the state and federal courts are in proximity, located only a few blocks apart. The individual parties and witnesses are employed in Orange County and are located in Orange

County. Therefore, this factor does not tip the balance toward dismissal of this federal action.

The third factor requires consideration as to whether piecemeal litigation may be circumvented by dismissing the federal action. Because the state action has been stayed pending this court's ruling on the motions to dismiss, piecemeal litigation is not a threat. Furthermore, Defendants have failed to demonstrate how jurisdiction of the federal court would result in piecemeal litigation. Therefore, this factor does not weigh in favor of dismissal.

The fourth factor addresses "the order in which jurisdiction was obtained by the concurrent forums." Colorado River, 424 U.S. at 818. Despite the language originally used to describe this factor in Colorado River, the Moses H. Cone decision clarified that this factor does not turn on which action was filed first, but is measured "in terms of how much progress has been made in the two actions." Moses H. Cone, 460 U.S. at 21. The facts before this court indicate that there has been relatively little progress in either forum, though substantive motions to dismiss have been filed in this court. Therefore, this factor also does not weigh in favor of dismissal.

The fifth factor is an evaluation of whether state or federal law will be applied. Although the Amended Complaint includes allegations against Orange County and members of the Orange County Code Enforcement Board, this action primarily seeks to redress alleged violations of the Wolks' rights secured by the United States Constitution. Therefore, this factor weighs against dismissal. See Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp., 878 F.2d 1360, 1373 (11th Cir.1989) (taking into account that federal civil rights law would govern adjudication of discriminatory zoning claim in reversing district court order dismissing claim pursuant to Colorado River doctrine).

With respect to the sixth and final factor, Defendants advance no reason to question the Florida court's ability to protect the Wolks' rights as they relate to this action. Indeed,

both state and federal courts are able to protect Plaintiffs' rights. Thus, this factor does not weigh in favor of dismissal.

In sum, although some of the Colorado River factors weigh slightly in favor of deference to the state court case, balancing these six factors does not present exceptional circumstances warranting a dismissal or stay of this federal action. Accordingly, the Orange County Defendants' motion to dismiss the present case in deference to the state court action is denied.

B. Facial Constitutionality of the Code Enforcement Scheme

In their Amended Complaint, the Wolks' main contention is that the code enforcement scheme contained in chapter 162 of the Florida Statutes and Chapter 11 of the Orange County Code is unconstitutional on its face because no hearing is required before the Code Enforcement Board enters an order imposing a per diem fine and a lien against the property. The Wolks argue that they were denied procedural due process when the fine/lien imposition order was recorded upon the filing of an "Affidavit of Non-Compliance" by the code inspector without an evidentiary hearing. However, in their motions to dismiss, the Defendants argue that the code enforcement scheme codified in the Orange County Code and the Florida Statutes comports with due process.

i. The Statutory Scheme

The provisions which the Wolks challenge as unconstitutional are contained in Chapter 162 of the Florida Statutes and Chapter 11 of the Orange County Code. Sections 162.01 through 162.13, Florida Statutes, which collectively comprise the "Local Government Code Enforcement Boards Act," ("the Act") and Article II of Chapter 11 of the Orange County Code (OCC) (§§ 11-26 through 11-41, OCC), known as "the 'Orange County Code Enforcement Board Ordinance'" ("the Ordinance") and

enacted pursuant to chapter 162, Florida Statutes, are attached hereto as Appendices.[14]

The Ordinance provides as follows regarding its purpose:

> It is the intent of this article to promote, protect, and improve the health, safety, and welfare of the citizens of the county by creating an administrative board with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in the county, where pending or repeated violations continue to exist.

§ 11-29, OCC.[15] The enforcement scheme established in the Ordinance provides that if a code violation is found, "the code inspector shall notify the violator and give him or her a reasonable time to correct the violation." § 11-34(b), OCC; §162.06(2), Fla. Stat. If the violation continues past the date set for correction, the inspector then notifies the code enforcement board and requests a hearing. § 11-34(b), OCC; § 162.06(2), Fla. Stat. The code enforcement board schedules a hearing and provides notice thereof to the violator. § 11-34(b), OCC; § 162.06(2), Fla. Stat. At the hearing, the enforcement board takes testimony from the code inspector, the property owner, and witnesses. § 11-35(c), OCC; § 162.07(3), Fla. Stat. Additionally, "[f]ormal rules of evidence shall not apply, but fundamental due

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[14]Citations in this order are to the 1995 version of chapter 162, Florida Statutes, and to the 2002 version of the Orange County Code, which has been provided to the Court.

[15]The parallel statutory provision, Section 162.02, states the same goals as to counties and municipalities.

process shall be observed and shall govern the proceedings." § 11-35(c), OCC; § 162.07(3), Fla. Stat.

After the hearing, the code enforcement board issues findings of fact, conclusions of law, and an order; the order "may include a notice that it must be complied with by a specific date and that a fine may be imposed." § 11-35(f), OCC; § 162.07(4), Fla. Stat. If the code enforcement board receives notification from the code inspector that the order has not been complied with by the specified compliance date, the code enforcement board "may order the violator to pay a fine ... for each day the violation continues past the date set by the code enforcement board for compliance." § 11-37(a), OCC; § 162.09(1), Fla. Stat. "If a finding of a violation or a repeat violation has been made as provided in this article, a hearing shall not be necessary for issuance of the order imposing the fine." § 11-37(a), OCC; § 162.09(1), Fla. Stat. Moreover, "[a] certified copy of an order imposing a fine may be recorded in the public records of the county and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." § 11-37(c), OCC; § 162.09(3), Fla. Stat.

An order imposing a fine may, upon petition to a state circuit court, "be enforced in the same manner as a court judgment." § 11-37(c), OCC; § 162.09(3), Fla. Stat. The fine "continue[s] to accrue until the violator comes into compliance or until the judgment is rendered to foreclose on a lien filed pursuant to this section, whichever occurs first." § 11-37(c), OCC; § 162.09(3), Fla. Stat. Final administrative orders of code enforcement boards are appealable to the circuit court. § 11-40, OCC; § 162.11, Fla. Stat. Such appeals are not de novo hearings but are "limited to appellate review of the record created before the code enforcement board." § 11-40, OCC; § 162.11, Fla. Stat.

ii. Analysis

In analyzing whether Orange County's code

enforcement scheme violates procedural due process, this court is guided by the Supreme Court's landmark decision in Mathews v. Eldridge, 424 U .S. 319 (1976). In Mathews, the Court outlined the parameters of procedural due process and explained:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. This court will analyze each of these factors in turn in the context of the Orange County code enforcement scheme.

a. The Private Interest Affected

In the instant case, the private interest at issue is a property interest. Although the recordation of a fine/lien imposition order by a code enforcement board does not effect a total loss of an owner's property, property owners do have an interest in owning and enjoying their property without encumbrances from code violation orders and liens, and such interests have been recognized as entitled to due process protections. In Connecticut v. Doehr, 501 U.S. 1, 12 (1991), the Supreme Court explained:

> [T]he Court has never held that only ... extreme deprivations trigger due process

> concern. See Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16, 18, 62 L.Ed. 149 (1917). To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process."

(Quoting Peralta v. Heights Med. .Ctr., Inc., 485 U.S. 80, 85 (1988)). The existence of such an encumbrance could impair the ability of the property owner to sell or engage in other transactions involving the property. For example, in this case the Wolks allege that the encumbrance prevented them from refinancing their property at historically low rates. Cf. Doehr, 501 U.S. at 11 (listing similar adverse consequences impacting owners whose property was subject to prejudgment attachment).

In considering the private interest involved, Mathews instructs that one factor to be examined is "the degree of potential deprivation" that may be effected by a particular decision. The Wolks, and other property owners against whom a code enforcement board order is recorded, face a temporary, partial encumbrance against their property rather than a total loss of ownership rights. Although property interests are implicated by recordation of the fine/lien imposition order, such recordation does not result in a permanent or total loss or impairment of a property right. Cf. Mathews, 424 U.S. at 340 ("Only in Goldberg v. Kelly, 397 U.S. 254 (1970)] has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation.").

The Mathews Court also noted that "the possible length of [the] wrongful deprivation ... is (also) an important factor in assessing the impact of official action on private interests.'" 424 U.S. at 341 (quoting Fusari v. Steinberg, 419

U.S. 379, 389 (1975). In the circumstances of the instant case, the encumbrance remains on the property until the violations of the electrical code are remedied by the property owner. Thus, although the length of the deprivation is uncertain, it is also to a large extent within the control of the property owner. Although the deprivation could be somewhat lengthy, as in Mathews "there is less reason here than in Goldberg to depart from the ordinary principle, established by [Supreme Court] decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." Mathews, 424 U.S. at 343; see also Doehr, 501 U.S. at 12 (noting, en route to concluding that attachment statute impacted a property interest, that "the State correctly points out that [the effects of the attachment] do not amount to a complete, physical, or permanent deprivation of real property [and that] their impact is less than the perhaps temporary total deprivation of household goods or wages").

Moreover, under the code enforcement scheme a property owner can eventually obtain nearly complete retroactive relief from a fine/lien imposition order. Through a motion to the code enforcement board or an appeal, the encumbrance on the property can be removed and the fine vacated or reduced. For example, in the instant case notwithstanding the allegations they now make, the Wolks were able to obtain an Affidavit of Compliance in December 1998, and they also ultimately succeeded at having the fine reduced from $182,000 to $10,000. These remedies reflect the temporary and partial nature of the impairment of interest at issue here.

b. The Risk of Erroneous Deprivation and the Probable Value of Addition or Substitute Procedural Safegauards

The second Mathews factor to be considered is the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards. In the context

of the code enforcement scheme at issue here, both the existing risk and the potential value of additional measures are quite small.

Under the Orange County code enforcement scheme, the alleged violator is first given a violation notice by an inspector and an opportunity to cure the violation. If the violator does not remedy the deficiencies, the inspector notifies the Code Enforcement Board and the matter is scheduled for a hearing at which the alleged violator can present evidence. After that hearing, the Board issues an order setting forth findings of fact as to the existence of violations and informing the property owner that if the deficiencies are not cured by a certain date a lien and a per diem fine will be imposed from that date until correction. The lien and fine are then imposed pursuant to an "Affidavit of Non-Compliance" filed by the code inspector, and the pertinent code provisions state that "a hearing shall not be necessary for issuance of the order imposing the fine." §162.09(1), Fla. Stat; § 11-37(a), OCC.

The risk of an erroneous imposition of a fine/lien under the code enforcement scheme is extremely low. The property owner having been afforded an opportunity to contest the alleged violations at a hearing and the violations having been found as a fact by the board, the act of the code inspector in rechecking the property for compliance is merely ministerial - the violations either have or have not been remedied. Compliance with the electrical code does not turn on credibility assessments, and a local government inspector is generally a trained professional who aims to proficiently serve the public. The odds are slim that the inspector would have a motive to submit a false affidavit of noncompliance or, as alleged here, execute a personal vendetta against the property owner. The risk of an erroneous deprivation is indeed minuscule.[16]

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[16]The smallness of the risk of error is evidenced by the use by the Wolks' counsel during oral argument of an example of the code

Turning to the probable value of additional procedures, the Wolks' suggestion of a second hearing appears unnecessary and even unworkable. Because of the cut-and-dried nature of the inquiry involved here, a hearing would be of little benefit. The issue of electrical code compliance is easily ascertainable and easily established by documentation - for example, by affidavit of an inspector, property owner, or hired electrician. The question of code compliance is even more straightforward than the disability determination at issue in Mathews, which "turn[s], in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists, '" 424 U.S. at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)), and is highly distinguishable from the situation involving the private tort plaintiff's case in Doehr. See also Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974) (finding that issues of "existence of the debt, the lien, and the delinquency" are "ordinarily uncomplicated matters that lend themselves to documentary proof"). And, as discussed below, a property owner is not precluded from submitting documentary evidence regarding compliance either pre- or post-deprivation; hence, little value would be added by imposing a hearing requirement prior to issuance of the fine/lien imposition order. As the Mathews Court noted, "To be sure, credibility and veracity may be a factor ... in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in

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inspector being "a madman" and refusing to issue an affidavit of compliance because of his insanity. The fact that an erroneous affidavit would conceivably be filed only in the circumstance of an insane inspector or a personal vendetta as aileged in this case buttresses the conclusion that the code enforcement scheme on its face is not constitutionally infirm.

Goldberg." 424 U.S. at 344-45. Again, here even more so than in Mathews, the pertinent inquiry does not turn on credibility determinations and little would be gained by an evidentiary hearing.

In considering the probable value of additional safeguards, the abundant safeguards already present in the code enforcement scheme should be emphasized. The property owner is given numerous notices of the violation and an opportunity to cure before an evidentiary hearing is held. After the hearing, the owner has the opportunity to appeal the determination that the violations in fact exist. Compliance or lack of compliance after the hearing is a straightforward matter which, "as applied to the generality of cases, not the rare exceptions," Mathews, 424 U.S. at 344, will correctly be determined by the code inspector. And, in cases where an incorrect determination is made, the property owner may file a motion or an appeal, or both, related to that determination. Thus, even in the event of an incorrect determination regarding cure the property owner is not without a remedy under the . existing scheme, and imposing a requirement of a hearing each time an Affidavit of Non-Compliance is filed would not significantly improve the process.

c. The Government's Interest

The final Mathews factor to be considered is the interest of the government, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews, 424 U.S. at 335. In the instant case, the county's interest is in protecting the safety and welfare of the public from hazardous electrical conditions. Unquestionably, this is a significant interest and one that is not antithetical to the Wolks' interests as property owners and landlords.

Moreover, the burdens that additional procedures would entail could be substantial. As discussed during oral argument on the present motions, imposing a hearing

requirement would mean not just one more hearing, but potentially an infinite number of hearings; a hearing would be required again and again, each time a property owner was alleged not to have corrected deficiencies noted in a compliance order. This could result in a very expensive and burdensome system for the county , with - in light of the extremely low risk of an erroneous deprivation discussed above - little, if any, corresponding benefit to the alleged violator or the public. As the Mathews Court explained:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefIt of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. ...
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> But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience

> of courts." The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," to insure that they . are given a meaningful opportunity to present their case.

424 U.S. at 348-349 (citations omitted).

The significant governmental and public interest involved here distinguishes the instant case from cases relied upon by the Wolks involving disputes between private parties. For example, in Connecticut v. Doehr, the Court addressed a state statute which permitted a prejudgment attachment based on an affidavit of a private litigant who had filed an unrelated tort suit against the defendant property owner. The Doehr Court specifically stated that "[n]o interest the government may have affects the analysis" and that "the [private] plaintiff's interest is de minimis" on its way to concluding that the procedures of the Connecticut attachment statute did not comport with due process. 501 U.S. at 16. The government interest involved here, along with the disinterested character of the affiant (the inspector), also distinguishes this case from County of Pasco v. Riehl, 635 So.2d 17 (1994), aff'g 620 So.2d 229 (Fla. 2d DCA 1993), in which a Florida "dangerous dog" statute was held unconstitutional where it permitted a dog to be classified as "dangerous" without any hearing based on an affidavit of a person claiming to have been attacked by the dog.

The government's significant, legitimate interest in public safety effectuated through enforcement of its building

codes cannot be gainsaid. As noted in the Act and Ordinance, the purpose of the legislation is to "promote, protect and improve the health, safety, and .welfare" via "an equitable, expeditious, effective, and inexpensive method of [code] enforc[ement]." § 11-29, OCC; § 162.02, Fla. Stat. Through its procedures, and as shown by the relief that the Wolks have already been able to obtain in the instant case through the filing of motions and appeals and the conduct of hearings, the scheme effectuates the stated purpose.

d. Balancing the *Mathews* Factors

In applying the Mathews factors, the court must assess whether the procedural protections warranted by the "particular situation" at hand are provided. The "particular situation" in the instant case involves the imposition of a lien and a per diem fine after numerous notices to and opportunities by the property owner to correct identified and established electrical code violations.

Although the Wolks contend that reliance on the inspector's "Affidavit of Non-Compliance" at the last stage prior to imposition of the lien and fine is improper and renders the code enforcement scheme procedurally deficient, this Court is unpersuaded. On balance, the Court concludes that although property owners undoubtedly have an interest in enjoying their property free of unwarranted encumbrances, because the risk of error and the likely benefit of additional procedures are so low and the interest of the government and the public in ensuring compliance with the electrical code so high, the code enforcement scheme which the Wolks now challenge provides adequate due process protections.

Although the subject provisions do not specifically provide for a hearing after an Affidavit of Non-Compliance is filed by a code inspector, the code enforcement scheme contains numerous procedural protections. First, from the outset the ordinance provides the property owner with numerous opportunities to cure the electrical code violations before the lien and per diem fine are imposed. The property

owner is given notice of the violations and an opportunity to cure. If corrective action is not taken, a hearing is provided. If the code enforcement board finds at the hearing that the alleged violations exist, those findings of fact are reduced to a written order and the property owner is given a certain date by which to correct the deficiencies or face the imposition of a fine or lien. The property owner may appeal the compliance order to the circuit court.[17]

If the property owner fails to remedy the violation, the code inspector files an Affidavit of Non-Compliance, upon which the Code Enforcement Board may then base its order imposing lien/fine. There is no infirmity in the board's reliance on the inspector's affidavit; as noted earlier, the reinspection is simply a ministerial act of checking whether the conditions - as established to exist at the prior hearing - have been alleviated. The inspector is merely entrusted with the task of assessing the property conditions. Moreover, although no hearing is provided for in the scheme prior to the imposition of the order, the property owner is not without an opportunity to object or be heard. For instance, the property owner could (if he is present) certainly make his or her case to the inspector at the time of the reinspection - a reinspection which is conducted at the behest of the owner. Additionally, although no hearing is provided for, the code enforcement scheme does not preclude the presentation and/or filing of written evidence of compliance - for example, an affidavit of an electrician or the property owner himself, or a receipt for services obtained from an electrician - with the code enforcement board. Indeed, in the instant case the Wolks filed a motion to vacate the fine/lien order, and they could have attached whatever supporting evidence they had to that motion. Although the statute and code provide that an appeal to the circuit court of an enforcement board order is not "a

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[17]Apparently the Wolks did not appeal the November 1996 compliance order and do not contest the finding that the violations existed as of that date; they contend only that they corrected the violations some time after that date.

hearing de novo but shall be limited to appellate review of the record before the code enforcement board," § 162.11, Fla. Stat.; § 11-40, OCC, there is no bar to creation of a record through the submission of documentary evidence - evidence well-suited and appropriate to this type of dispute.

Additionally, the Defendants have argued in support of their motions to dismiss that the Wolks had available to them an appeal to the Board of Building Adjustments and Appeals, which is provided for in Chapter Nine of the Orange County Code. At oral argument, the Wolks' response to this contention was that the Board of Building Adjustments and Appeals is not the decisionmaker and that therefore an appeal to that body does not provide due process. However, due process does not require an evidentiary hearing before "the decisionmaker" prior to adverse administrative action in all circumstances. Here, the code enforcement scheme provides for a low-risk assessment of non-compliance by a presumably responsible, disinterested inspector. If the property owner feels that the determination is incorrect or, as alleged here, intentionally false, the property owner has the opportunity to submit evidence and to appeal either to the circuit court or the board of adjustments or appeals, or both.

In sum, the code enforcement scheme at issue in this case provides low-risk, fair procedures prior to the imposition of a temporary , although somewhat indefinite, lien and fine against a code violator's property. As evidenced by the Wolks' own allegations regarding the relief they have obtained through motions, hearings, .and appeals, the code enforcement scheme strikes an appropriate balance between the rights of property owners and the governmental interest in ensuring the safety of the public at low cost to that same public. Thus, the challenged provisions of chapter 162, Florida Statutes, and chapter 11 of the OCC are not unconstitutional as violative of due process.

Although the Wolks' primary argument as to unconstitutionality relates to procedural due process, in their Amended Complaint the Wolks also allege constitutional

infirmities in several statutory and code provisions based on substantive due process, right to jury. trial and to confront witnesses, excessive fines, and equal protection. However, the Court finds no merit to these contentions. First, the due process concerns that the Wolks raise regarding the code enforcement scheme are procedural rather than substantive. See McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). Second, the Sixth Amendment right to a jury trial and to confront witnesses applies to criminal prosecutions and not to the imposition of civil fines, and the Court rejects the Wolks' contention that the code enforcement scheme is "quasi-criminal and penal." U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him ...."). Third, section 162.09(1), Florida Statutes, and Section 1137(a), OCC, do not on their face provide for an excessive fine in violation of the Eighth Amendment. Cf. United States v. Fleetwood Enters., Inc., 689 F. Supp. 389, 392 (D. Del. 1988) ("Even if the Court were to assume that the civil penalty in §611 [of the Manufactured Housing Act] falls under the Excessive Fines Clause of the Eighth Amendment, § 611(a) cannot be unconstitutional on its face because it in no way mandates an excessive fine."). Finally, Section 162.09(2), Florida Statutes, and Section 11-37(b), OCC, do not violate equal protection on their face. In sum, the Court finds all of the Wolks' facial unconstitutionality claims to be without merit.

C. § 1983 Claim

In Count I of their Complaint, the Wolks bring a claim against all of the Defendants under 42 U.S.C. § 1983 for denial of procedural due process under the Fifth and Fourteenth Amendments; for denial of substantive due process under the Fifth and Fourteenth Amendments; for denial of the right to trial by jury and the opportunity to

confront witnesses under the Sixth and Fourteenth Amendments; and for subjection to excessive fines under the Eighth and Fourteenth Amendments (Amended Complaint, Doc. 10 ¶ 74). All of these claims are premised on the alleged unconstitutionality of the code enforcement scheme, and in light of the Court's determination above that the pertinent statutory and code provisions are not constitutionally infirm, the § 1983 claim also fails and will bedismissed. Nevertheless, the Court will address the immunity defenses of the Defendants and other alleged grounds for dismissal.

i. Absolute Immunity

1. Absolute Immunity of Assistant County Attorney Dorsett

Even if there were a constitutional flaw in the code enforcement scheme, Assistant County Attorney Dorsett would benefit from absolute immunity from the § 1983 suit. The allegations against Assistant County Attorney Dorsett are based on his representation of the County's position before the Code Enforcement Board in the enforcement proceedings against the Wolks. As explained by the Sixth Circuit court in Cooper v. Parrish, 203 F.3d 937, 947 (6th Cir.), cert. denied, 531 U.S. 877 (2000), absolute immunity has been extended beyond criminal prosecution to civil enforcement actions:

> Although the Supreme Court has yet to address directly whether prosecutors are entitled to absolute immunity when they act as advocates in the course of a civil rather than a criminal action, several other courts of appeals have determined that prosecutors are protected by absolute immunity "when their duties are functionally analogous to those of a prosecutor's, regardless of whether those duties are performed in the course of a civil or

> criminal action." Schrob v. Catterson, 948 F.2d 1402, 1411 (3rd Cir. 1991); see also Mendenhall v. Goldsmith, 59 F.3d 685, 691 (7th Cir.) (explaining that the fact that "the alleged misconduct here arose in the context of a civil proceeding with a law enforcement purpose does not render absolute immunity inappropriate. The essential inquiry is whether [the prosecutor] was functioning in an enforcement role analogous to that of a prosecutor.") (citations and footnote omitted), cert. denied, 516 U.S. 1011, 116 S.Ct. 568, 133 L.Ed.2d 492 (1995). We agree that the prosecutors in this case may still be absolutely immune even though the alleged constitutional violations occurred when the officials were pursuing a civil action. Indeed, as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense.

See also Zar v. S.D. Bd. of Exam'rs of Psychologists, 976 F.2d 459, 466 (8th Cir. 1992) ("[Absolute] immunity applies even to an agency attorney performing the same prosecutorial function within the administrative hearing process."); cf. Gray v. Poole, 243 F.3d 572, 577 {D.C. Cir. 2001) {holding "that govemment attorneys who prosecute child neglect actions perform 'functions analogous to those of a prosecutor [and] should be able to claim absolute immunity with respect to such acts'") {quoting Butz v. Economou, 438 U.S. 478, 515 {1978)). This court finds these decisions well-reasoned and that extension of prosecutorial immunity to civil enforcement proceedings is appropriate. In the instant case, the allegations against Dorsett relate to his role as Assistant County Attorney in the code enforcement proceedings

against the Wolks, and accordingly Dorsett would be entitled to absolute immunity.

2. Absolute Immunity of the Code Enforcement Board Defendants

The members of the Code Enforcement Board argue that they enjoy absolute immunity from the § 1983 suit because the claims arise from these Defendants' legitimate governmental activities as legislators. However, the authorities cited by these Defendants in support of their absolute immunity argument involve legislative activity, which is not at issue here. Although "state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities," Bogan v. Scott-Harris, 523 U.S. 44, 49 {1998), as correctly noted by the Wolks in their response to the motion {Doc. 33), "[i]n determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity," a "functional approach" is applied "which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993) (quoting Forrester v. White, 484 U.S. 219, 229 (1988)). The absolute immunity of legislators "'extends only to actions taken within the sphere of legitimate legislative activity.'" Woods v. Gamel, 132 F.3d 1417, 1419 (11th Cir. 1998) (citing Brown v. Crawford County, Ga., 960 F.2d 1002, 1011 (11th Cir.1992) (quoting Finch v. City of Vernon, 877 F.2d 1497, 1505 (11th Cir.1989))). Acts are legislative acts when they are "policymaking and of general application." Woods, 132 F.3d at 1420. Here, the alleged actions of the Code Enforcement Board Defendants which form the basis of the Wolks' claims against them were not acts of general application and thus were not of a legislative nature. Consequently, these Defendants would not enjoy

absolute legislative immunity in this case.[18]

ii. Qualified Immunity

The Individual Defendants have moved to dismiss the claims against them on the basis of qualified immunity. In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court described the framework for analyzing qualified immunity claims:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right

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[18]Although the Code Enforcement Board Defendants do not benefit from absolute *legislative* immunity in this case, these Defendants might possibly benefit from absolute *judicial* or *quasi-judicial* immunity. Such absolute immunity has been extended to members of some boards serving judicial functions. See, e.g., Dunham v. Wadley, 195 F.3d 1007 (8th Cir. 1999) (concluding that members of veterinary medical examining board enjoyed absolute quasi-judicial immunity); Sultenfuss v. Snow, 894 F.2d 1277, 1278-79 (11th Cir. 1990) (noting that "parole board members are entitled to quasi-judicial immunity from suits requesting damages based upon the decision to grant or withhold parole"). On the other hand, such immunity has been denied to members of other boards. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (finding that school board members were entitled to qualified rather than absolute immunity in §1983 action); accord Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499 (11th Cir. 1990). The Defendants have not raised this argument, and in any event, in light of the Court's conclusion that these Defendants benefit from qualified immunity, the Court need not resolve the question of their entitlement to absolute judicial or quasi-judicial immunity.

> is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.
>
> ... "The contours of the right [that the official is alleged to have violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

533 U.S. at 201-02 (citations omitted). Thus, for the individual Defendants claiming a qualified immunity defense, a two-step analysis is required. First, the court must

evaluate whether the alleged conduct of the particular defendant violated a constitutional right. If so, then secondly the court must assess whether that right was clearly established. In considering the qualified immunity defenses raised by the various Defendants in this case, it is helpful to divide the allegations into two categories: 1) allegations against the Code Enforcement Board Defendants and the Assistant County Attorney, who are accused of acting in accordance with the code enforcement scheme; and 2) allegations against the inspectors and county officials related to claims that false citations and affidavits were intentionally produced and filed.

1. Qualified Immunity of the Code Enforcement Board Defendants

Even if this Court had found the code enforcement scheme to be constitutionally deficient, the doctrine of qualified immunity would shield the members of the Code Enforcement Board accused of no more than carrying out their responsibilities under the code and following the letter of the statute and ordinance. It would not be clear to a reasonable Code Enforcement Board member "that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. Therefore, qualified immunity would be appropriate for all named Code Enforcement Board members - Defendants Humble, Perkins, Hill, Wrye, Kaschai, Wyatt, Rodgers, Powers, Boyer, Hammock, and Chernega.[19]

2. Qualified Immunity Defenses Raised by Orange County Inspectors and Managers

The qualified immunity defense also would be applicable to the remaining individual Orange County

[19]In light of the Court's conclusion that the Code Enforcement Board Defendants would enjoy qualified immunity, the Court does not reach the alternative arguments raised in the motion to dismiss (Doc. 28) filed by these Defendants.

Defendants with respect to allegations based solely on the defendants' execution of their duties in accordance with the constitutionally sound code enforcement scheme. However, the Amended Complaint contains additional allegations - related to conspiracy and the falsification of citations and affidavits - which are more problematic for inspector defendants Boston, Reilly, and Frenk. Applicability of the qualified immunity defense to these defendants must also be analyzed in light of these allegations, and an analysis of the specific allegations against the remaining individually named Orange County officials is warranted.

Defendant inspectors Boston, Reilly, and Frenk are alleged to have conspired in August 1996 to inflict financial harm on the Wolks by exploiting Orange County's code enforcement scheme so as to cause a false and fraudulent judgment to be entered against the Wolks that would impose monetary fines and encumber their property. The Amended Complaint contains allegations that in executing the conspiracy Reilly told the Code Enforcement Board that the Wolks' property was not in compliance with various electrical codes, knowing these statements to be false. In furtherance of the conspiracy, after the initial compliance order had been issued and the Wolks had cured the alleged deficiency Reilly again allegedly filed false affidavits reporting that the violations had not been corrected.

A reasonable investigator would have known that such fraudulent conduct allegedly undertaken by Boston, Reilly, and Frenk would amount to a violation of the Wolks' constitutional rights. Cf. Cruz v. Kauai County, 279 F.3d 1064, 1068 (9th Cir. 2002) ("[A] complaint that an officer knowingly filed a false affidavit to secure an arrest warrant states a claim under § 1983."). The argument that Boston, Reilly, and Frenk are entitled to qualified immunity because they had no power to directly deprive the Wolks of due process or impose fines is unpersuasive. Section 1983 creates a cause of action against every person who, under color of law, causes any citizen to be subject to a deprivation

of constitutional rights. The allegations that the inspectors lied and misled the Code Enforcement Board to deprive the Wolks of property therefore would constitute a sufficient claim under § 1983 if there were indeed a due process flaw in the code enforcement scheme.

The factual allegations in the Amended Complaint relating to Boston, Reilly, and Frenk, along with the attachments identifying exactly which documents are alleged to be false, sufficiently satisfy the heightened pleading requirements for § 1983 claims recognized in GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998). Although the factual allegations against Boston are comparatively limited, he is alleged to have conspired with the other inspectors to carry out a scheme to deprive the Wolks of their rights - a scheme described in detail in the Amended Complaint. Accordingly, the Wolks' claim against Boston also would be sufficient.

The Wolks have also sued Reilly and Frenk's supervisor, Chief Electrical Inspector Fox. The Amended Complaint contains allegations that Steven Wolk and Fox discussed the conduct of Reilly and Frenk. According to the Amended Complaint, Fox ignored the Wolks' allegations, endorsed the misconduct of his subordinates, and told Mr. Wolk that the County would not grant the Wolks an "affidavit of compliance" unless they replaced all electrical panels in the building. In sum, the Wolks contend Fox failed to prevent Reilly and Frenk from using their positions as code inspectors to deprive Plaintiffs of their constitutional rights. In response to their claims, Fox has also raised the defense of qualified immunity.

The timing of Steven Wolk's reports to Fox is significant. According to the Amended Complaint, Steven Wolk reported the allegedly fraudulent conduct of Reilly and Frenk to Fox on April 11 and 14, 1997. This was after Reilly submitted the allegedly false affidavit to the Code Enforcement Board on February 7, 1997 and after the Code Enforcement Board's March 19, 1997 order imposing fines

had been issued and recorded. For a supervisor to be subject to a § 1983 claim, the supervisor must have been alleged to have personally participated in the unconstitutional conduct or to have notice of the violations due to their prevalence and blatancy. As explained by the Eleventh Circuit:

> [Supervisory] liability under section 1983 "must be based on something more than a theory of *respondeat superior*. Supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so."

Dolihite v. Maughon, 74 F.3d 1027, 1052 (11th Cir. 1996) (quoting Cross v. Ala. Dep't of Mental Health & Mental Retardation, 49 F.3d 1490, 1508 (11th Cir. 1995) (quoting Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990)) (alteration and emphasis in original). "A supervisor sued in [his] individual capacity is entitled to qualified immunity unless a reasonable supervisor would have known that his or her actions were unlawful in light of clearly-established law and the information possessed." Id. (citing Greason v. Kemp, 891 F.2d 829, 836-37 (11th Cir. 1990)).

Applying this standard, Fox would be entitled to qualified immunity. The Amended Complaint does not contain allegations that Fox had knowledge that members of his staff had conspired to deprive Plaintiffs of their constitutional rights. Nor does the Amended Complaint contain allegations that Fox knew his subordinates had submitted a false affidavit to the Code Enforcement Board.

At most, Plaintiffs allege that Fox failed to accept and respond to the unsubstantiated, after-the-fact accusations leveled by Steven Wolk. Under the circumstances, Fox's conduct was reasonable, and he would be entitled to the defense of qualified immunity.

Plaintiffs have also sued Orange County Code Enforcement Division Manager Pittman, but Pittman also would benefit from a qualified immunity defense. He is alleged to have provided insufficient training. Specifically, he allegedly failed, with deliberate and reckless indifference to the constitutional rights of Orange County property owners, to put a policy in place that would have required all inspectors to receive training on the limitations posed by the United States Constitution on the actions of code inspectors. (Amended Complaint, Doc. 10 ¶ 78). The allegations against Pittman are also insufficient.

Inadequacy of training may only serve as the basis for § 1983 liability when the need for training is "so obvious" and the failure to train "so likely to result in the violation of constitutional rights" that such failure amounts to a "deliberate indifference" to the rights of citizens. City of Canton v. Harris, 489 U.S. 378, 388-90 (1989). To establish a deliberate indifference, "a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir.1998). In the instant case, the Wolks claim that Pittman, with deliberate indifference to the constitutional rights of property owners, failed to establish a training policy addressing the requirements of the Constitution on code inspectors. However, the Amended Complaint does not allege facts indicating that it should have been obvious to Pittman that inspectors were engaged in practices that resulted in violations of property owners' constitutional rights. Accordingly, Pittman is entitled to qualified immunity and the claims against him shall be dismissed.

iii. § 1983 Claim Against Attorney Mantzaris and His Firm

Even if the code enforcement scheme were constitutionally flawed, the Amended Complaint would fail to state a § 1983 cause of action against counsel for the Code Enforcement Board, Mantzaris, and his firm, DDKSMN. These Defendants are merely alleged to have given the Code Enforcement Board members legal advice. This act by private actors of giving legal advice to a client - even if that client is a state actor- does not constitute action "under color of law" as required for a § 1983 cause of action. Cf. Tunheim v. Bowman, 366 F. Supp. 1395, 1398 (D. Nev. 1973) ("Absent a direct interest of the attorney in the litigation, it is only the client who stands to profit from procedures in deprivation of another's civil rights, and it is appropriate that he should be held, in a proper case, to respond in damages. An attorney acting only in a professional capacity cannot be held to judge at his peril with respect to the decision of difficult questions which divide the courts and provoke debate among legal scholars."); cf. also Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding, in § 1983 action by suspended basketball coach at state university, that university's actions pursuant to the rules and recommendation of NCAA did not render the NCAA a state actor).

D. Statute of Limitations

As acknowledged by the Wolks and the Orange County Defendants, there is a four-year statute of limitations for § 1983 actions arising in Florida. Burton v. City of Belle Glade, 178 F.3d 1175, 1188 (11th Cir. 1999). This four-year limitations period is borrowed from Section 95.11(3), Florida Statutes, which provides limitations for personal injury suits. Id. The present action was filed on February 2, 2001. Therefore, the critical date four years earlier is February 2, 1997. As set forth by the Fourth Circuit in Bireline v. Seagondollar, 567 F.2d 260 (4th Cir. 1977), the accrual date

of the limitations period is the day that the plaintiff knows or has reason to know of the injury which is the basis of the action.

It is well-settled that "[a] motion to dismiss under [Rule 12(b)(6)] based upon the statute of limitations may be granted, however, only where it is apparent on the face of the complaint that the action is untimely." Griffiths v. Blue Cross & Blue Shield of Ala., 147 F. Supp. 2d 1203, 1221 (N.D. Ala. 2001); accord Ambrose v. Catholic Soc. Servs., Inc., 736 So.2d 146, 149 (Fla. 5th DCA 1999) ("[O]nly under extraordinary circumstances where the facts in the complaint, taken as true, conclusively show that the action is barred by the statute of limitations, should a motion to dismiss on this ground be granted."). Although the Amended Complaint describes some events that took place before February 2, 1997, it is not "apparent on the face of the complaint" that the Wolks' cause of action accrued prior to that date. Therefore, the County Defendants' motion to dismiss is without merit insofar as it is based on statute-of-limitations grounds.

However, a different statute of limitations applies to the estate of Reilly. The Orange County Defendants argue that the claims against Reilly's estate are barred pursuant to Section 733.710(1), Florida Statutes, which states in part that "2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent." Orange County states that Reilly passed away on December 9, 1997, and that claims against Reilly or his estate are thus barred. The Wolks, however, correctly note that the date of Reilly's death was not pled in the Amended Complaint and may not be supplied by unsupported assertions made in moving papers.

E. Punitive Damages

The Defendants have also moved to dismiss the

Wolks' claims for punitive damages.[20] In support of this motion, the Defendants rely on Section 768.72, Florida Statutes, which states in part:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

This section is inapplicable to the Wolks' federal Constitutional claims brought pursuant to § 1983. The Eleventh Circuit has expressly held that "the pleading rules set forth in Fed.R.Civ.P. 8{a){3) preempt § 768.72's requirement that a plaintiff must obtain leave from the court before including a prayer for punitive damages." Porter v. Ogden, Newell & Welch, 241 F.3d 1334, 1340 {11th Cir. 2001); accord Bass *ex rel.* Lewis v. Wallenstein, 769 F.2d 1173, 1190 {7th Cir. 1985) {"Nor can restrictive state law preclude the estate's recovery of punitive damages in a case in which the showing of 'recklessness or callous indifference' required by Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 {1983), has been made. 'To disallow punitive damages in Section 1983 actions solely on the basis of restrictive state tort law would seriously hamper the deterrence effect of Section 1983.'") {quoting Bell v. City of Milwaukee, 746 F.2d 1205, 1241 (7th Cir.1984)). In the

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[20]The Orange County Defendants moved to dismiss the claim for punitive damages (Docs. 31 & 32); the Code Enforcement Board Defendants moved to strike it (Doc. 28). In light of the Court's conclusion regarding qualified immunity and claim insufficiency as to the Code Enforcement Board Defendants, their motion to strike the punitive damages claim shall be denied as moot.

instant case, the alleged fraudulent acts of the code inspectors could, if proven, constitute a reckless or callous disregard to the Wolks' constitutional rights. Therefore, the motion to dismiss the punitive damages claim is without merit.

Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Motion to Dismiss Amended Complaint {Doc. 28) filed by Defendants W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran Wyatt, W. Steven Rodgers, Jim Powers, Beverly Boyer, Joel Hammock, Mark Chernega, Daniel Mantzaris, and Drage, DeBeaubien, Knight, Simmons, Mantzaris & Neal, P.A. {"DDKSMN") is **GRANTED**. The Motion to Strike (Doc. 28) the punitive damages claim against these Defendants is **DENIED as moot**.

2. The Motion to Dismiss Pursuant to Rule 12(b)(6) and Rule 8(a), Federal Rules of Civil Procedure (Doc. 31) filed by Defendants Orange County, Terry Boston, Marlene Reilly, Edward Frenk, Edward Fox, Jr., Melvin Pittman, and George Dorsett is **GRANTED in part** and **DENIED in part**.

3. The Amended Complaint (Doc. 10) is **DISMISSED** in its entirety.

4. All other pending motions are **DENIED as moot**.

5. The Clerk is directed to close the file.

DONE and **ORDERED** in Orlando, Florida this _5th_ day of November, 2002.

s/_____
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

APPENDIX C

FILED
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
No. 02-16662-GG
FEB 10 2004

STEPHEN WOLK,
HELEN J. WOLK,

THOMAS K. KAHN
CLERK

Plaintiffs-Appellants,

versus

ORANGE COUNTY, FLORIDA
a political subdivision of
the State of Florida,
TERRY W. BOSTON, individually, et al.,

Defendants-Appellees.

ATTORNEY GENERAL OF FLORIDA,

Intervenor,

- - - - - - - - - - - - - - - - - -

On Appeal from the United States District Court for the
Middle District of Florida

- - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ____F.2d____).

Before: BLACK and HULL, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

*Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

(1)

Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

No. 03-1545

IN THE

Supreme Court of the United States

STEPHEN WOLK AND HELEN J. WOLK, PETITIONERS

v.

ORANGE COUNTY, FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The CEB Defendants disagree with the questions presented for review and would submit the following:

1. Whether sections 162.07 and 162.09 of the Florida Statutes, and sections 11-35 and 11-37 of the Orange County Code (collectively referred to as "the provisions") provide for sufficient due process to alleged code violators such that these provisions are constitutional where they provide for a pre-deprivation notice and an evidentiary hearing and require an affidavit from a county code inspector regarding noncompliance before any lien is placed against a property owner's property.

2. Whether the District Court properly determined that the CEB related Defendants were entitled to qualified immunity based on the allegations of the complaint as such allegations attempt to set forth a § 1983 action.

LIST OF ALL PARTIES IN LOWER COURT

A list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed herein, listed alphabetically, is as follows:

Terry W. Boston;
Beverly M. Boyer;
Mark A. Chernega;
George L. Dorsett;
State of Florida (as amicus curiae);
Edward J. Fox, Jr.;
Edward A. Freak;
Joel D. Hammock;
Ronald Hill;
W. Robert Humble;
Mary Kaschai;
Daniel F. Martzaris;
Orange County, Florida;
Orange County, Florida Code Enforcement Board;
Joseph Perkins;
Melvin Pittman;
Jim Powers;
Marlene Reilly (as Personal Representative of the
Estate of Joseph James Reilly);
W. Steven Rodgers;
Helen J. Wolk;
Stephen Wolk;
Jimmy Wrye; and
Fran H. Wyatt.

A corporate disclosure statement is not required

pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States[1] because there is no petitioner herein that is a nongovernmental corporation.

[1] All references to rules in this petition are to the Rules of the Supreme Court of the United States, and therefore will be made hereinafter by reference to the number of the rule only, e.g., "Rule 29.6".

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NOT SUBJECT TO SIGNIFICANT POTENTIAL ERRORS; AND (D) THE WOLKS' ACTIONS DEMONSTRATE THAT THEY AVAILED THEMSELVES OF SEVERAL POST DEPRIVATION OPPORTUNITIES TO HAVE THE LIEN REMOVED OR REDUCED.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Brief In Opposition is submitted by Respondents, W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran H. Wyatt, W. Steven Rodgers, Jim Powers, Beverly M. Boyer, Joel D. Hammock, Mark A. Chernega, Daniel F. Mantzaris and Drage, deBeaubien, Knight, Simmons, Mantzaris & Neal, P.A., n/k/a deBeaubien, Knight, Simmons, Mantzaris & Neal LLP. With the exception of Mr. Mantzaris and the Drage Law Firm, all of these Respondents were past or are present members of the Orange County Code Enforcement Board ("CEB"); Mr. Mantzaris was, and is, the acting attorney for the CEB and a partner in the Drage Law Firm. During the course of this Opposition Brief, these Respondents will be collectively referred to as the CEB Defendants.

Respondents request that this Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on November 18, 2003.

INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Middle District of Florida dismissing the Wolks' Amended Complaint on the basis that appropriate procedural due process was afforded to the Wolks under the standards enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). With regard to the CEB Defendants, the District Court also

determined that the cause of action should be dismissed against them even if the ordinance and state were unconstitutional because they were entitled to qualified immunity. (District Court Opinion Pages 34 and 39).

In considering the issue of whether another notice and hearing should be added prior to the imposition of a lien, the District Court found that "[t]he risk of an erroneous imposition of a fine/lien under the code enforcement scheme is extremely low" because the property owner is:

> "afforded an opportunity to contest the alleged violations at a hearing and the violations having been found as a fact by the board, the act of the code inspector in rechecking the property for compliance is merely ministerial-the violations either have or have not been remedied." See Page 20 of District Court decision.

In addition, the District Court noted that additional hearings (as proposed by the Wolks prior to the imposition of a lien) would be "unnecessary and even unworkable." (District Court Decision Page 21). This is especially the case because the applicable ordinance and statute do not preclude the property owner from submitting documentary evidence regarding compliance either pre- or post-deprivation.

The Wolks try to stir the procedural due process pot by asserting that the only opportunity that a property owner has for demonstrating compliance with the applicable building codes is at the initial evidentiary hearing on the original citation. This position, however,

was not joined by the District Court or the U.S. Court of Appeals for the Eleventh Circuit; indeed, the District Court noted that a property owner was not precluded from bringing forth evidence of compliance either pre or post deprivation. In fact, the Wolks filed several post deprivation motions with the Code Enforcement Board and with the Circuit Court and were successful in reducing the fine from $182,000 to $10,000.

The type of grievances voiced by the Wolks are really no different than those voiced, and resolved in favor of the governmental entity, in the Court's recent decision in *City of Los Angeles v. David*, 538 U.S. 715 (2003). In the *City of Los Angeles* case, the Court found that due process was not compromised by Los Angeles' thirty day delay in holding a hearing after a vehicle had been towed. This holding was premised on the fact that the vehicle towing process was "unlikely to spawn significant factual errors" and that the "straightforward nature of the issue—whether the car was illegally parked—indicates that initial towing errors, while they may occur, are unlikely."*Id.* at 718. This is similar to the finding made by the District Court in the case at bar, to wit: the act of determining whether electrical code violations were corrected on the Wolks' property was "ministerial" in nature.

The due process afforded the WOLKS under the Orange County, Florida Code Enforce Ordinances is significantly greater than that set forth in the *City of Los Angeles* case. Unlike the vehicle owners in the *City of Los Angeles'* case, the Wolks had an evidentiary hearing BEFORE any lien was imposed or deprivation suffered. Even if the Court were to determine that Chapter 162 was unconstitutional, the claims against

the CEB Related Defendants were properly dismissed because these defendants enjoyed qualified immunity.

The WOLKS' Petition For Writ of Certiorari raises no conflict between the United States Circuit Courts of Appeal, with any United States Supreme Court case or with any decision of the Florida state courts. Further, the salient issues were recently addressed in the *City of Los Angeles* case and in the decisions cited therein.

STATEMENT OF THE CASE

The CEB Defendants do not accept Petitioners-Wolks' Statement of the Case because it contains substantial irrelevant information not germane to the disposition of the Petition. Thus, the CEB Defendants offer the following Statement of the Case:

A. BASIS OF THE FINES ASSESSED AGAINST THE WOLKS

This case arises from the imposition of fines by the CEB for electrical code violations on the Wolks' rental property; the authority for such fines is found in *Fla. Stat.* Chapter 162 and Orange County Code Section 11-37[1].

STATUTORY BASIS FOR THE CEB'S ACTIONS:

---

[1] Since the key Orange County Code provisions mirror *Fla. Stat.* Chapter 162 provisions, references in this Brief to Chapter 162 will collectively refer to both provisions.

The Wolks' Amended Complaint did not assert that the CEB related defendants failed to follow the step by step procedures of *Fla. Stat.* Chapter 162 and the applicable Orange County Code provision; rather, the Wolks essentially argued that the provisions did not adequately comport with due process requirements.

The procedures under *Fla. Stat.* Chapter 162, are as follows:

1. A code inspector initiates enforcement procedures under *Fla. Stat.* Section 162.06(1).

2. When a violation is found, the code inspector notifies the violator and gives him or her a reasonable time to correct the violation. *Fla. Stat.* Section 162.06(2).

3. If the violation continues after the reasonable time, the code inspector notifies the CEB. *Fla. Stat.* Section 162.06(2).

4. The CEB then conducts a hearing. *Fla. Stat.* Section 162.06(2).

5. At the hearing, the CEB hears testimony under oath from the Code Inspector and the violator without applying the "[f]ormal rules of evidence" and observing "fundamental due process." *Fla. Stat.* Section 162.07(3).

6. When the hearing concludes, the CEB issues findings of fact, conclusions of law and an Order

affording the "proper relief consistent with powers granted herein." *Fla. Stat.* Section 162.07(4)(emphasis added).

7. The CEB's Order "may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under the conditions specified in s. 162.09(1), the cost of repairs may be included along with the fine if the order is not complied with by said date." *Fla. Stat.* Section 162.07(4). Further, "[a] certified copy of such order may be recorded in the public records." *Id.* If compliance is achieved, the CEB "shall" issue an order acknowledging compliance which "shall" be recorded in the public records. *Id.*

8. If the Code Inspector notifies the CEB that timely compliance has not occurred or that there is a repeat violation, the CEB may order the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set for compliance or for each date the repeat violation continues using the "date the repeat violation is found to have occurred by the code inspector." *Fla. Stat.* Section 162.09(1). The fine (at the time this matter occurred) could not exceed $250 per day unless it is a repeat violation; in such an instance the fine could not exceed $500 per day. *Fla. Stat.* Section 162.09(2).

9. The CEB may reduce a fine and may record a certified copy of the Order imposing a fine on the public records. *Fla. Stat.* Sections 162.09(2)(c) and (3).

10. Prior to Orange County being entitled to take ANY action to foreclose the lien, the County must seek authorization from the CEB. *Fla. Stat.* Section

162.09(3).

KEY FACTS:

The WOLKS' rental property was cited for electrical code violations on August 9, 1996, by Orange County, Florida code inspectors; correction of the violations were required to be made by August 26, 1996.

After an inspection and a code inspector determination that the violations were not corrected, the code inspector requested a hearing before the Orange County Code Enforcement Board. The Wolks were notified of the evidentiary hearing, appeared and presented their evidence on November 20, 1996.

The Board entered a Compliance Order which provided:

(1) the violations noted in the statement of violation existed and had to be corrected by December 4, 1996.
(2) failure to timely cure the violations would result in the imposition of a $250 per day fine for each day after December 4 that the violations remained uncorrected.
(3) The Wolks were directed to contact the inspector asserting the violation to arrange for a compliance inspection once the remedial work was completed.
(4) The CEB determined that the electrical code violation presented a "serious threat to the public health, safety, and welfare"; consequently, a copy of the order was being sent to Orange

County.

The Wolks did not seek any review of the Board's Order although such was authorized under the Orange County, Florida Code. A code inspector issued an Affidavit of Non-Compliance on February 7, 1997, which resulted in the Orange County Code Enforcement Board issuing an Order "Imposing Administrative Fine/Lien on March 19, 1997. This Order fined the Wolks $250 per day for each day of noncompliance after December 4, 1996.

On April 16, 1997, the Wolks filed a Motion To Vacate the Fine Order as being fraudulently procured; this Motion was presented to the Orange County, Florida Code Enforcement Board which refused to hear the matter because it had no express statutory authority to hear such a motion.

On June 22, 1998, the Wolks requested that Orange County inspect their property and this inspection resulted in an Affidavit of Compliance being submitted to the Orange County, Florida Code Enforcement Board on December 3, 1998. The fine against the Wolks' property was computed to be $182,000 for which the Wolks filed a Motion To Reduce with the Board.

At a hearing on January 20, 1999, the Board entered an Order reducing the fine from $182,000 to $100,000. Still not satisfied with the amount of the reduction, the Wolks moved to vacate the Fine Order and the Fine Reduction Order as being void and inconsistent with due process. This matter was heard before the Board on March 15 and April 19, 2000. The

Board denied the Wolks' motion to vacate.

The Wolks filed suit in Orange County, Florida Circuit Court appealing the Fine Reduction Order. By Order dated January 8, 2001, the Circuit Court found the $100,000 fine to be excessive and it was later reduced to $10,000.00.

REASONS FOR DENYING THE PETITION CONTRARY TO PETITIONER'S ASSERTION, THE SUBJECT DECISION HOLDING SECTIONS 162.07 AND 162.09, FLA. STAT. (SECTIONS 11-35 AND 11-37, ORANGE COUNTY CODE) CONSTITUTIONAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT ON PROCEDURAL DUE PROCESS, NOR WITH THE FLORIDA APPELLATE COURT OF LAST RESORT, BECAUSE: (A) A PROPERTY OWNER IS AFFORDED REASONABLE DUE PROCESS PRIOR TO THE IMPOSITION OF ANY LIEN INCLUDING NOTICE AND AN EVIDENTIARY HEARING ON THE INITIAL DETERMINATION OF WHETHER A CODE VIOLATION HAS OCCURRED; (B) A LIEN IS IMPOSED ONLY AFTER A CODE INSPECTOR FILES AN AFFIDAVIT OF NONCOMPLIANCE:
(C) THE CODE INSPECTOR'S DETERMINATION OF COMPLIANCE IS A MINISTERIAL FUNCTION NOT SUBJECT TO SIGNIFICANT

POTENTIAL ERRORS; AND (D) THE WOLKS' ACTIONS DEMONSTRATE THAT THEY AVAILED THEMSELVES OF SEVERAL POST DEPRIVATION OPPORTUNITIES TO HAVE THE LIEN REMOVED OR REDUCED

I. The Decision Below Does Not Conflict With Any United States Supreme Court Decision or Decision of a United States Court of Appeals.

The decisions by the United States Court of Appeals for the Eleventh Circuit and the United States Middle District in this case do not conflict with any decision of the Court or the United States Court of Appeals. Indeed, the Court has very recently addressed the issues raised by the Wolks in the *City of Los Angeles* case and the decision fully supports the rulings in the case below.

The facts in the subject case emphasize that the Wolks had several pre and post deprivation opportunities to contest the lien and its amount and availed themselves of these opportunities.[2]

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court set forth the procedural due process requirements:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be

[2] With the lien being ultimately reduced from $182,000 to $10,000.

> affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

The *Mathews* analysis is fluid; it takes into account the "situational" perspective of the intent behind the statute, the rights being affected and the application of the statute setting forth the steps to be followed. Obviously the key consideration and objective in reviewing each of the *Mathews* elements is to strike the proper balance.

In applying the *Mathews* balancing test, the Court examines the degree of the potential deprivation and the length of the deprivation. *Mathews*, 424 U.S. at 340-41. In the present case, the Wolks did not lose all property rights related to their property; they suffered a temporary, partial encumbrance against their property, which **could** be removed once the violations are corrected. This is consistent with *Connecticut v. Doehr*, 501 U.S. 1 (1991) in which an attachment (somewhat similar to the subject deprivation) was distinguished from a complete or permanent deprivation as with a loss of household goods or wages. *Id.* at 12. Further, as noted in the District Court opinion in this case, such a deprivation is to a large extent within the control of the property owner. In such an

instance, something less than an evidentiary hearing is sufficient prior to administrative action.

Pursuant to Orange County, Fla. Code Section 9-14, the violator has the right to seek review of the code inspector's decision to the Building Codes Board of Adjustments and Appeals:

> The board [Building Codes Board of Adjustments and Appeals] shall have the following powers and duties subject to the procedures as may be set forth in this chapter, article II of chapter 18:
>
> > **(1) To hear any appeals from a decision of the building official as to the application or interpretation of a technical code pursuant to section 9-21 of the Orange County Code;**

Due to the large number of avenues available to an alleged violator, to provide any more hearings would be unduly burdensome; the determination of whether a code violation has been remedied is perfunctory or ministerial in nature. Such compliance or lack of compliance is straightforward; even if there is some error or question, the property owner has the right of appeal and the right to file a motion (as was done by the Wolks).

The third element of the *Mathews* test involving

the government's interest clearly supports the CEB related Defendants' actions, especially in light of the intent expressed in *Fla. Stat.* Section 162.02:

> It is the intent of this part to promote, protect, and improve the **health, safety,** and welfare of the citizens . . . by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide an **equitable, expeditious, effective and inexpensive method** of enforcing any codes and ordinances in force . . . where a pending or **repeated** violation continues to exist. (emphasis added).

In the present case, the Wolks' violations were electrical code violations in an apartment complex, a potentially serious safety hazard (i.e., fire, electrocution, etc.); this was not a case where the Wolks' property was deemed unsightly or that there was a non-authorized use of the property. If a violator was given the opportunity to have a hearing before the CEB on each decision made by either the code inspector or the CEB, then the process would be slow, ineffective, time consuming and expensive to all parties. This approach would further be inconsistent with the intent of the statute to "promote, protect and improve the health, safety and welfare of the citizens."

In addition to all of the previously referenced avenues of appeal afforded to the Wolks, the Wolks also had the option of appealing the CEB's initial November 20, 1996 Order to the Circuit Court as set forth *Fla.*

Stat. Section 162.11:

> An aggrieved party . . . may appeal a **final** administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed. (emphasis added).

Certainly, a person cannot be deprived of a property interest without some kind of notice and afforded some kind of hearing. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). In the case below, the Wolks had notice and an evidentiary hearing at the outset when they were first cited for electrical code violations and were advised that failure to timely correct the citations would result in a lien being imposed against their property.

According to the Wolks, however, this due process is not enough. They assert that property owners should have yet another hearing on the ministerial determination of whether the citations have been corrected. On balance, such a request is excessive because it would in effect double the volume of cases to be heard by the Orange County Code Enforcement Board. This point has not been lost on the Court before, as is seen in the *City of Los Angeles* case:

> The third Eldridge factor—the "Government's interest" argues strongly in the city's favor. The nature of the city's

> interest in delay is one of administrative necessity. The city points out that it "conducts more than a thousand vehicle impound hearings annually." Pet. For Cert. 8. It holds about five percent of these hearings-those involving individuals who are unable to afford the impoundment fees-within 48 hours. Ibid. It "takes time to organize hearings: there are only so many courtrooms and presiding officials; the city has to contact the towing officer and arrange for his appearance; the city may have to find a substitute to cover that officer's responsibilities while he attends the hearing." 538 U.S. at 718.

The subject case is factually distinguishable from the case of *County of Pasco v. Riehl*, 635 So.2d 17 (Fla. 1994). In the *Riehl* decision, the Florida Supreme Court determined that an ordinance which allowed a dog to be determined to be a dangerous animal upon an affidavit from a citizen that the dog was dangerous was unconstitutional because it did not provide for notice and a hearing prior to deprivation. Under the applicable ordinance, impoundment of the animal could be made on the affidavit of a citizen attesting to the fact that the animal was dangerous. This is decidedly different from the case below where a property owner is afforded notice and an evidentiary hearing on any alleged code violation and the lien is imposed only after an affidavit from a county code inspector.

Similarly, the case of *Massey v. Charlotte County*, 842 So.2d 142 (Fla. 2d DCA 2003) is

distinguishable. In the *Massey* case, Florida's Second District Court of Appeal determined that *Fla. Stat.* Chapter 162 should provide "some type of procedure" after entry of an order finding a code violation to determine whether the alleged violation continued, how long it continued, and whether there was any reason to reduce the per diem fine imposed in light of attempts by the [property owner] to comply." *Id.* at 147.

As previously noted, Orange County, Florida's Ordinances provide a remedy for a property owner to appeal a decision by a building official, such as a code enforcement inspector (Orange County, Fla. Ordinance No. 9-14). This Ordinance provides the relief that the *Massey* Court suggested should be in place under *Fla. Stat.* Chapter 162 to remedy the risk of improper seizure and due process violations.

It is wholly apparent that the decision in the case below is consistent with *Mathews*, *Doehr* and the *City of Los Angeles'* decisions and factually distinguishable from the *Riehl* decision. Thus, there is no basis for conflict certiorari.

II. Even If Chapter 162 Was Determined To Be Unconstitutional, the CEB Defendants Would Still Be Entitled to Qualified Immunity.

In its Order Granting the Defendants' Motion To Dismiss the Wolks' Amended Complaint, the United States District Court for the Middle District of Florida determined that the CEB Defendants were entitled to qualified immunity. (District Court Decision Pages 34 and 39).

As to the Orange County, Florida Code Enforcement Board members, this ruling is consistent with *Saucier v. Katz*, 533 U.S. 194 (2001) because it would not be "clear... 'that his conduct was unlawful in the situation he confronted.' (District Court Decision Page 34 *citing Saucier*, 533 U.S. at 202.

As to the CEB's attorney and his law firm, giving legal advice to a client-even if that client is a state actor-does not constitute action 'under color of law' as required for a Section 1983 cause of action. (District Court Decision Page 39).

Thus, there is no basis for a Petition For Certiorari where even if there was some indication that the statute or ordinance was unconstitutional, the Court had yet another compelling reason to dismiss the Complaint.

CONCLUSION

The orders of the Court of Appeals and the District Court are fully consistent with the United States Supreme Court decisions and the decisions of the United States Courts of Appeal on the due process issues. Further, the decisions do not conflict with the decisions of the Florida Supreme Court in the *Riehl* case or the Second District Court of Appeal for the State of Florida in the *Massey* case.

Even if Chapter 162 was determined to be unconstitutional, the Wolk decision was appropriate as to the CEB Defendants because they were entitled to qualified immunity.

The CEB Defendants respectfully request this Court issue an order denying the Wolks' Petition For Writ of Certiorari.

DATED: June 14, 2004

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In The

Supreme Court of the United States

STEPHEN WOLK and HELEN J. WOLK,

Petitioners,

v.

ORANGE COUNTY, FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS ORANGE COUNTY, TERRY BOSTON, MARLENE REILLY, EDWARD A. FRENK, EDWARD J. FOX, JR., MELVIN PITTMAN AND GEORGE DORSETT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although Petitioners in their Initial Brief presented three questions for review, Respondents disagree with the manner in which they are framed and respectfully restate the questions presented as follows:

I. WHETHER THIS CASE PRESENTS A CONFLICT OF DECISIONS AMONGST THE FEDERAL CIRCUIT COURTS OF APPEALS, OR WITH A STATE COURT OF LAST RESORT, OR WITH THIS COURT SO AS TO WARRANT THIS COURT EXERCISING ITS DISCRETIONARY JURISDICTION TO REVIEW THIS PETITION FOR WRIT OF CERTIORARI.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL BY THE TRIAL COURT OF PETITIONERS' AMENDED COMPLAINT WHICH ATTEMPTED TO ALLEGE DUE PROCESS VIOLATION CLAIMS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PURSUANT TO 42 U.S.C. § 1983 AGAINST RESPONDENTS.

III. WHETHER THERE IS A COMPELLING REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners correctly identify the parties. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents state that no nongovernmental corporations or publicly held companies are a party to this action.

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The unreported order of the court of appeals is reproduced in Petitioners' Appendix A. The unreported opinion of the district court is reproduced in Petitioners' Appendix B. The unreported order of the court of appeals denying Petitioners' Petition for Rehearing and Petition for Rehearing En Banc is reproduced in Petitioners' Appendix C.

JURISDICTION

The United States District Court for the Middle District of Florida, Orlando Division, entered its order dismissing the Petitioners' Amended Complaint on November 5, 2002. The United States Court of Appeals for the Eleventh Circuit entered its per curiam affirmance of the district court's order on November 18, 2003. The United States Court of Appeals for the Eleventh Circuit entered its order denying the Petitioners' Petition for Rehearing and Petition for Rehearing En Banc on February 10, 2004. Petitioners filed their Petition for Writ of Certiorari on May 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Procedural Background

On February 2, 2001, Petitioners, Stephen Wolk and Helen J. Wolk, filed a Complaint in the United States District Court for the Middle District of Florida, Orlando Division, against W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran Wyatt, W. Steven Rogers, Jim Powers, Beverly Boyer, Joel Hammock,

Mark Chernega, Daniel Mantzaris, and Drage de Beaubien, Knight, Simmons, Mantzaris & Neal, P.A. (hereinafter collectively referred to as the "Code Enforcement Defendants") and Orange County, Terry Boston, Marlene Reilly (as personal representative of the estate of Joseph J. Reilly), Edward A. Frenk, Edward J. Fox, Jr., Melvin Pittman, and George Dorsett (hereinafter collectively referred to as the "Orange County Defendants"). On or about May 24, 2001, Petitioners filed an Amended Complaint. This Brief in Opposition to Petition for Writ of Certiorari is filed on behalf of the Orange County Defendants.

Both the Orange County Defendants and the Code Enforcement Defendants filed Motions to Dismiss in the trial court. On April 5, 2002, the trial court issued a "Notice of Hearing, Request for Additional Briefings, and Certification to the Attorney General to the State of Florida" directing the parties to file supplemental briefs, scheduling the pending motions for hearing on April 26, 2002 and inviting the Florida Attorney General to appear on behalf of the State of Florida since the constitutionality of a Florida Statute was being called into question by the Amended Complaint.

After the hearing held on April 26, 2002, the trial court issued an order dismissing Petitioners' Amended Complaint in its entirety. Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on December 4, 2002. On November 18, 2003, the Eleventh Circuit affirmed per curiam the district court's order. Thereafter Petitioners filed a Petition for Rehearing and Petition for Rehearing En Banc which was denied by the United States Court of Appeals for the Eleventh Circuit on February 10, 2004. Petitioners filed a

Petition for a Writ of Certiorari to this Court on May 3, 2004.

II. Factual Background

The Petitioners are record owners of property located at 401 Niblick Avenue, Orlando, Florida, known as the "Dubsdread Apartments." On August 9, 1996, an inspection of the Dubsdread Apartments was conducted by Orange County Inspectors, Reilly and Frenk, during which violations of the Orange County electrical code were found. A citation was issued by Inspector Reilly to the Petitioners directing them to correct the violations by August 26, 1996. A reinspection was conducted at the "Dubsdread Apartments" and the inspectors determined that the violations had not been corrected. On September 24, 1996, Inspector Reilly requested a hearing before the Orange County Code Enforcement Board (hereinafter referred to as the "CEB"). Formal notice was given to the Petitioners of a scheduled hearing on the violations which was held before the CEB on November 20, 1996. Stephen Wolk, the son and attorney for the Petitioners attended the hearing and had the opportunity to offer testimony and present evidence. Inspector Reilly also presented testimony to the CEB regarding the violations. At the conclusion of the hearing, the CEB found that the electrical code violations existed, had not been corrected and that said violations should be corrected by December 4, 1996. The order informed the Petitioners that if the violations were not cured by December 4, 1996, the Petitioners would be fined up to $250.00 per day until the violations were corrected. Moreover, the order made findings that the violations presented a serious threat to the public health, safety and welfare and instructed the Petitioners to contact the code

inspector for reinspection. Although the Orange County Code permitted an appeal from such an order, the Petitioners did not appeal the CEB order of November 20, 1996.

After several reinspections of the Dubsdread Apartments, Inspector Frenk issued an inspection notice violation regarding electrical violations on the property. On January 15, 1997, the Petitioners advised Inspector Reilly that they would not perform any additional work as requested by Inspector Reilly to bring the property into compliance. Thereafter, on February 7, 1997, Inspector Reilly filed an Affidavit of Non-compliance with the CEB stating that the Petitioners had not complied with the November 20, 1996 CEB order. On March 19, 1997, the CEB issued an order imposing a fine of $250.00 per day against the Petitioners with the limitation of the fine commencing on December 4, 1996. On April 7, 1997, the order imposing the fine was recorded in the public records of Orange County, Florida and the order then became a lien against the Petitioners' property. On April 16, 1997, the Petitioners filed a motion to vacate the fines imposed by the CEB, which motion was denied by the CEB.

At the request of Petitioners, on June 22, 1998, the "Dubsdread Apartments" were reinspected by Orange County Inspector Vern Ogden. After inspecting the property, Mr. Ogden issued an inspection notice citation regarding electrical violations at the property setting forth the nature of the violations and repair work needed to bring the property into compliance with the Orange County Code. On December 3, 1998, Inspector Ogden issued an Affidavit of Compliance. Because the fines continued to accrue retroactively from December 4, 1996

until December 3, 1998, the total fines imposed against the Petitioners had accrued to $182,000.00.

On January 20, 1999, Petitioners' daughter, Gina L. Wolk, a co-owner of the "Dubsdread Apartments" and a non-party to the CEB action, filed a motion to reduce the amount of the fine. Pursuant to Ms. Wolk's motion, the CEB reduced the fine from $182,000.00 to $100,000.00. Thereafter, the Petitioners filed a motion to vacate the orders imposing the fine and lien which was denied by the CEB. The Petitioners appealed the CEB order denying the Petitioners' motion to vacate the orders to the Ninth Judicial Circuit Court of Florida. In the appeal proceedings, the Petitioners requested that the fine be reduced to $18,000.00. On January 8, 2001, the Ninth Judicial Circuit Court of Florida remanded the case to the CEB directing the CEB to further reduce the fine. On February 21, 2001, the CEB entered an order reducing the fine to $10,000.00 if paid by March 23, 2001, and directing that if the fine was not timely paid that it would be increased to $18,000.00.

On February 2, 2001, Petitioners filed the instant action in the United States District Court for the Middle District of Florida and on March 23, 2001, the Petitioners filed a state court action in the Ninth Judicial Circuit Court of Florida alleging in large measure the same claims alleged in the instant action. In connection with the filing of the state court action on March 23, 2001, the Petitioners deposited $10,000.00 into the registry of the Ninth Judicial Circuit Court of Florida.

III. The Statutory Scheme of the State Statute and the Orange County Ordinances Being Challenged by the Petitioners

The Petitioners' main contention is that Orange County's code enforcement ordinances which are modeled after Florida's code enforcement statutes, Chapter 162 of the Florida Statutes, is unconstitutional on its face because the statutory scheme authorizes the CEB to enter an order imposing a per diem fine and a lien against a property owner's property prior to a hearing being held on the accuracy of the affidavit of noncompliance and imposition of a per diem fine and lien. Petitioners argue that the statutory scheme is unconstitutional because it fails to provide adequate due process because of the lack of the requirement for an additional hearing prior to imposition of a fine and lien even though the property owner is provided with notice and an opportunity to be heard prior to the initial order by the CEB finding a violation or violations of the Orange County Code. The Petitioners challenge the constitutionality of both the state and county code enforcement provisions. The county and state code enforcement provisions shall, collectively, be referred to as the statutory scheme. References to the Orange County Code shall be designated as Orange County Code with the code section and references to the state code will be designated as Florida Statutes with the code section.

Under the statutory scheme, Orange County employs inspectors who are charged with inspecting properties to determine if there are violations of the Orange County Code. If a code enforcement inspector finds violations of the code, the code enforcement inspector notifies the violator and gives him or her a reasonable opportunity to correct the violations. Orange County Code § 11-34(b)

and Florida Statutes § 162.06(2). If the violations continue beyond the date set by the inspector for correction, the inspector is authorized to notify the CEB and request a hearing on the violations Orange County Code § 11-34(b) and Florida Statutes § 162.06(2). The CEB then schedules a hearing and provides notice to the property owner of the hearing. Orange County Code § 11-34(b) and Florida Statutes § 162.06(2). At the public hearing, testimony is provided by the code inspector and any witnesses and the property owner if the property owner chooses to be heard. Orange County Code § 11-35(c) and Florida Statutes § 162.07(3). At the conclusion of the hearing, the CEB issues finding of facts, conclusions of law, and an order as to whether the violations exist. If the CEB finds that a violation or violations exist, the order will require that the violations be corrected by a specific date. The order may also, if appropriate, provide that if the violations are not corrected by such date, that a fine may be imposed. Orange County Code § 11-35(f) and Florida Statutes § 162.07(4). Additionally, the order may provide that if the violations are not corrected by the date specified, that a certified copy of the order may be recorded in the public records and shall then become a lien upon the property owner's property. Orange County Code § 11-37(a) and Florida Statutes § 162.09(1).

Under the statutory scheme, if a finding of a violation has been made by the CEB at the initial hearing, a subsequent hearing is not required for issuance of the order imposing the fine or the lien. Orange County Code § 11-37(a) and Florida Statutes § 162.09. The fine continues to accrue until the violator either brings the property into compliance or until the lien is foreclosed and a judgment is rendered, which ever occurs first. Orange County Code

§ 11-37(c) and Florida Statutes § 162.09(3). Under the statutory scheme, final administrative orders of the CEB are appealable to the Ninth Judicial Circuit Court of Florida. Orange County Code § 11-40 and Florida Statutes § 162.11.

The purpose and intent of the statutory scheme is to promote, protect and improve the health, safety and welfare of citizens by creating an administrative board with authority to impose fines and other non-criminal penalties to provide an equitable, expeditious, effective and inexpensive method of enforcing the codes. Orange County Code § 11-29 and Florida Statutes § 162.02.

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT PRESENT A CASE WHICH PRESENTS A CONFLICT OF DECISIONS AMONGST THE FEDERAL CIRCUIT COURTS OF APPEALS, OR WITH A STATE COURT OF LAST RESORT, OR WITH THIS COURT.

As grounds for requesting that this Honorable Court exercise its discretionary jurisdiction, Petitioners contend that the decision below conflicts with the entire line of this Court's decisions on procedural due process and with that of the Florida state court of last resort which is the Florida Supreme Court. Petitioners argue that the decisions below are a glaring departure from the entire body of federal and state law. However, a review of the decision of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Middle District Court of Florida, clearly demonstrates that such decisions do not

conflict with any decision of this Honorable Court or the United States Court of Appeals or the Florida Supreme Court.

Contrary to Petitioners' contention, the underlying 43 page order from the United States District Court for the Middle District Court of Florida, Orlando Division, thoroughly analyzed the statutory scheme and the procedural due process procedures provided by said statutory scheme and followed the parameters of procedural due process set forth in this court's seminal case of *Matthews v. Eldridge*, 424 U.S. 319 (1976). The district court below took great pains to demonstrate how its decision followed this Court's long line of established jurisprudence with respect to procedural due process and the safeguards mandated by this Court.

The underlying order of the district court analyzed the facts in the instant case in the context of the three part balancing test set forth in *Matthews*, i.e., the private interest that will be affected by the official action of the CEB; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and Orange County's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. In applying the *Matthews* balancing test the district court gave due consideration to the fact that the imposition of a fine or lien by the CEB affected the Petitioners' property interest in owning and enjoying Petitioners' property without encumbrances from CEB liens and further recognized that because Petitioners' property interests were affected, that Petitioners were entitled to certain due process protections.

The district court weighed the degree of potential deprivation involved in the imposition of a lien on Petitioners' property by the CEB and determined that the lien constitutes a temporary, partial encumbrance as opposed to a total loss of ownership rights. In applying the first prong of the *Matthews* balancing test to the facts at hand the district court noted that although Petitioners' property interest in being free from encumbrances triggered, certain due process procedures, that the length of the temporary partial encumbrance was to a large extent within the control of the Petitioners. The district court also observed that under the statutory scheme, the Petitioners could eventually obtain nearly complete retroactive relief from a fine or lien imposition order and could apply to the CEB for removal or reduction of the fine. In fact, after obtaining the affidavit of compliance in December 1998, Petitioners through the exercise of motions and appeals were successful in having the fine reduced from $182,000.00 to $10,000.00.[1]

In applying the second prong of the *Matthews* balancing test, the district court properly relied upon where appropriate, and distinguished where appropriate, prior holdings of this Court addressing the risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards. In the instant case, the Petitioners under the statutory scheme were first provided with a violation notice by an inspector and provided with an opportunity to correct the violation. Failing to correct

[1] This is perhaps the best evidence of the fact that the statutory scheme provides appropriate due process safeguards.

the violation, the inspector notified the CEB which scheduled the matter for a hearing after proper notice to the Petitioners. During the hearing, both the Petitioners and the inspector were given the opportunity to make a presentation to the CEB which ultimately issued an order informing Petitioners that it had determined that electrical code violations existed and that if the violations were not corrected by a certain date, a per diem fine would be imposed upon Petitioners' property until the property was brought into compliance and further that the order imposing the fine could be recorded in the public records and become a lien upon the Petitioners' property.

Since the Petitioners were afforded notice and an opportunity to be heard regarding the existence of the violations before the CEB, and because the CEB, after reviewing the evidence presented by the Petitioners' and the inspector, made a determination that electrical code violations existed, the risk of an erroneous imposition of a fine or lien under the code enforcement scheme was extremely low even though the statutory scheme did not provide for additional hearings after the code inspector reinspected the property for compliance. The action of the code inspector in reinspecting the property for compliance with the electrical code, at this point, became a relatively ministerial act.

Under such circumstances, the district court reasoned that the ministerial act of reinspecting to determine compliance with the electrical code, carries with it a minuscule risk of error and does not require an additional full-blown evidentiary hearing. The district court correctly noted that electrical code compliance is easily discernable by a trained inspector with a low risk of error as the determination of compliance does not turn on credibility of

witnesses or other intangible issues such as may have been the case in *Connecticut v. Doehr*, 501 U.S. 1 (1991). In accordance with the second prong of the *Matthews* balancing test, when the risk of error is low, whether further evidentiary or oral presentation opportunities are required by due process, must be weighed against the probable value of such evidentiary hearings or oral presentations. The district court correctly ruled that under the circumstances presented the risk of error was low and that further hearings on such technical issues of compliance with an electrical code, after an initial finding of violations by the CEB, would be of little added benefit.

In applying the last prong of the *Matthews* balancing test, i.e., the governments' interest, the district court again considered the *Doehr* case, which involved a state statute which allowed prejudgment attachment based solely on the affidavit of a private litigant, filing an unrelated tort suit against a property owner. The *Doehr* court held that such a statutory scheme did not comport with due process. However, the factual scenario in this case is significantly different from the *Doehr* scenario. The interest of Orange County is far different from the interest of a private litigant who stands to gain from filing an affidavit which results in a prejudgment attachment against the private litigant's adversary. The purpose of the code enforcement statutory scheme is to promote, protect and improve the health, safety and welfare of the public through an equitable, expeditious, effective and inexpensive method of code enforcement. This legitimate governmental interest would be significantly hampered by imposing procedures requiring potentially multiple hearings, after the initial determination hearing with little or no additional value added

to the process. Such inspection was deemed to be ministerial much like the issue of determining whether disability benefits should be terminated.

After applying the *Matthews* balancing test, the district court properly ruled that the statutory scheme provided a low risk, fair procedural process prior to the imposition of a temporary fine and/or lien against the Petitioners' property. Additionally, under the statutory scheme, the Petitioners through motions, hearings and appeals, were provided with the opportunity to obtain relief after the temporary imposition of a fine and/or lien. Under such circumstances, the statutory scheme at issue provides adequate procedural due process in keeping with this Court's long line of cases mandating appropriate due process and contrary to Petitioners' contention does not conflict with federal jurisprudence on procedural due process.

Petitioners also contend that the district court's order and the circuit court of appeals per curiam affirmance, conflicts with decisional law of the Florida Court of last resort, i.e., the Florida Supreme Court. Petitioners rely upon the case of *County of Pasco v. Riehl*, 635 So. 2d 17 (Fla. 1994) for this proposition. However, Petitioners' reliance upon *Riehl*, just likes its reliance upon *Doehr*, is misplaced, as both cases are clearly distinguishable from the case at hand. In the *Riehl* case, the Florida Supreme Court addressed the issue of the constitutionality of an ordinance which allowed a dog to be classified as a dangerous animal and to be impounded without a predeprivation hearing, based solely on an affidavit from a citizen alleging that the dog was dangerous. The Florida Supreme Court held that such a statutory scheme was unconstitutional for failure to provide notice and an opportunity to be

heard prior to classification of the dog as a dangerous dog and impoundment of the dog.

The factual scenario before this court is clearly distinguishable from that in the *Riehl* case, in that the Petitioners, under the code enforcement statutory scheme, are initially provided with notice and an opportunity to be heard prior to a finding of a violation. Additionally, even though an additional hearing is not provided for under the statutory scheme, prior to the imposition of fines or a lien if the violation is not corrected, the property owner is afforded other procedures for addressing the property owner's concerns such as an appeal of the compliance order to the state circuit court. Additionally, the property owner under the code enforcement statutory scheme is not precluded from presenting and/or filing written evidence of compliance or motions to vacate the fine/lien order or appealing a non-compliance affidavit to the Orange County Board of Adjustments and Appeals and thereafter to the Circuit Court of Florida.[2] Under such circumstances, the existing statutory scheme provides adequate due process safeguards for the Petitioners in keeping with the parameters established in this Court's precedent and the precedent established by Florida's court of last resort.

No Florida court has ruled that the statutory code enforcement scheme of Florida Statutes Chapter 162 is unconstitutional. Florida appellate courts reviewing the

[2] Under Orange County Code § 9-14, a property owner is authorized to appeal a decision of the building official such as a code inspector to the Orange County Board of Adjustments and Appeals and thereafter may appeal further through a petition for writ of certiorari to the Ninth Judicial Circuit Court of Florida.

statutory code enforcement scheme have accepted the presumption that the code enforcement scheme is facially constitutional. In *Michael D. Jones, P.A. v. Seminole County*, 670 So. 2d 95 (Fla. 5th DCA 1996), the Fifth District Court of Appeal of Florida noted that presumably Florida Statutes § 162.09 would be interpreted to permit the presentment of defenses prior to enforcement of any lien and that, **the statute provides for the fundamental due process requirements of notice and a hearing, making of a record, and appeal, although such an appeal is not *de novo*.** *Id.* at 96. In *Verdi v. Metropolitan Dade County*, 684 So. 2d 870 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 703 (Fla. 1997), the Third District Court of Appeal in reviewing other unrelated issues of the code enforcement scheme did not note any constitutional infirmity in the statutory scheme.

In *Massey v. Charlotte County, Florida*, 842 So. 2d 142 (Fla. 2d DCA 2003), a case where the Appellant challenged Charlotte County Florida's code enforcement scheme,[3] the *Massey* court stated in its analysis that " . . . we are not required to determine in this case whether the statute [Florida Statutes Chapter 162] is facially unconstitutional. However, in this context we have previously noted, it is necessary to fill the procedural gaps in Chapter 162 by the common-sense application of basic principles of due process." *Id.* at 145. The *Massey* court concluded that the Masseys were not afforded appropriate procedural due process by the CEB. However, the *Massey* court expressly

[3] The *Massey* court is not a state court of last resort. It is a Florida district court of appeal on equal footing as the courts in *Michael D. Jones, P.A.* and *Verdi*, *supra*.

declined to mandate any specific procedure that the code enforcement board would be required to follow and declined to hold the statutory scheme unconstitutional.

Further, *Massey* is distinguishable from the case at hand as it is not clear whether the Masseys had an opportunity to request a reduction of the fine imposed on them as the Wolks did in the case at bar or what other opportunities the property owners may have had to contest the affidavit of noncompliance such as through presentation of written evidence or motions or an appeal to the Board of Adjustment and Appeals, as is permitted under the Orange County statutory scheme. The *Massey* court did not certify to the Florida Supreme Court, the question of the constitutionality of the code enforcement scheme or the procedural due process issues as being matters of great public importance of creating a conflict with the Florida Supreme Court or any other Florida appellate court.

Although Petitioners mischaracterize the facts of this case as a flagarant constitutional violation to their due process rights, the district court's order correctly held in keeping with established jurisprudence of this Court and the Florida Supreme Court, that the code enforcement statutory scheme does not unconstitutionally deprive the Petitioners of their rights to due process.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL BY THE TRIAL COURT OF PETITIONERS' AMENDED COMPLAINT.

The Amended Complaint was properly dismissed by the district court with an affirmance by the Court of

Appeals for the Eleventh Circuit as the Amended Complaint was not adequate to withstand the motions to dismiss filed by the Respondents. Petitioners contend that the Amended Complaint was adequate to state a cause of action and should not have been dismissed because the Amended Complaint contained allegations that orders were issued imposing a fine and a lien on Petitioners' property without notice and a hearing in violation of Petitioners' due process rights. Petitioners' contention is that under the standard for review for motions to dismiss, said allegations should have been accepted by the district court as true and that based solely on these allegations the Amended Complaint should not have been dismissed.

In order to accept Petitioners' theory one would also have to accept the premise that the trial court below was required to accept Petitioners' legal conclusion that the order imposing the fine and the lien without notice and an opportunity to be heard was a per se violation of the Petitioners' due process rights. Neither the trial court, nor the court of appeals were required to accept such unfounded or improper conclusions of law simply because Petitioners asserted them on the face of the Amended Complaint. Certainly, well established jurisprudence provides that for purposes of a motion to dismiss, all well pled facts are accepted as true and the reasonable inferences from such facts are to be construed in the light most favorable to the plaintiff. However, unsupported conclusions of law and of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal when appropriate. It has long been established jurisprudence, that conclusory allegations and unwarranted deductions of fact are not required to be accepted by a court as true, in ruling on a motion to dismiss. *South Fla. Water Mgmt.*

Dist. v. Montalvo, 84 F.3d 402, 408 n.10 (11th Cir. 1996); and *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003).

Additionally, although the district court must accept as true all well-pled allegations, it is also entitled to make reasonable inferences from the allegations in the Amended Complaint as stated and any attachments to the complaint. The trial court below is required to analyze Plaintiffs' allegations of due process violations in the context of the actual due process afforded to the Plaintiffs as alleged in the Amended Complaint and its attachments and not based solely on the Petitioners' bare allegations to the contrary. Such analysis necessarily requires an in-depth review of the relevant statutory scheme and code provisions challenged by the Petitioners and an application of the facts as alleged in the Amended Complaint and set forth in exhibits attached to the Amended Complaint against existing legal precedent. Ultimately, the district court correctly determined that even when viewed in the light most favorable to the Petitioners, the Amended Complaint did not state a cause of action for violation of procedural due process when analyzed under the balancing test set forth in *Matthews v. Eldridge* and its progeny.

In applying the *Matthews* balancing test, the district court was not required to accept Petitioners' unfounded conclusions of law and unwarranted deductions of fact and allegations which were clearly contradicted by statutory provisions and attachments to the Amended Complaint. As a review of the Amended Complaint and attachments thereto, revealed, the Petitioners, in fact, had both pre-deprivation and post-deprivation due process under the statutory scheme and under the due process parameters set forth in *Matthews*. Therefore, the

district court correctly dismissed the Amended Complaint and the Court of Appeals for the Eleventh Circuit properly affirmed the district court's dismissal.

Petitioners further contend that the issue of qualified immunity was prematurely and improperly addressed by the district court. However, Petitioners' fail to accept the fact that the district court's dismissal of the Amended Complaint was not based solely upon the qualified immunity defense of the individual Respondents, but was instead based upon the district court's reasoning that no due process violation had occurred with respect to the Petitioners. The district court addressed the issue of qualified immunity as to the Respondents in their individual capacities as an informational tool, but made it clear in its order that the dispositive basis for the dismissal was that the statutory scheme was not facially unconstitutional and accordingly no constitutional violation had occurred. Without a constitutional violation, there can be no violation of a clearly established right. *Smith v. Siegelman*, 322 F.3d 1290 (11th Cir. 2003).

Additionally, Petitioners fail to observe the established rule that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation and that questions of qualified immunity are to be resolved at the earliest possible state in litigation. It is appropriate for a district court to grant the defense of qualified immunity to individuals at the motion to dismiss stage if the complaint fails to allege a violation of a clearly established constitutional right. A defendant may assert his qualified immunity defense, prior to trial, in one of three ways, all of which require the trial court to consider the issue of qualified immunity as a matter of law. First, a defendant may move for a dismissal under Fed.R.Civ.P. 12(b)(6) for

failure to state a claim. Second, the defendant may raise his affirmative defense in his answer and move under Fed.R.Civ.P. 12(c) for judgment on the pleadings. Third, the defendant may present matter outside the pleadings and move for summary judgment under Fed.R.Civ.P. 56(e). *See Bennett v. Parker*, 898 F.2d 1530 (11th Cir. 1990).

III. PURSUANT TO RULE 10 OF THE UNITED STATES SUPREME COURT, THERE IS NO COMPELLING REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Even if one were to assume for the sake of argument, that the dismissal was improvidently granted in favor of the Respondents, such would not be a valid reason for this Court to exercise its certiorari review. Rule 10 of this Court provides in pertinent part that: "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons . . . ". The instant case does not present compelling reasons for this Court to exercise its discretionary review, as the per curiam affirmance by the Court of Appeals for the Eleventh Circuit below does not conflict with other federal circuit courts of appeal or applicable decisions of this Honorable Court and does not conflict with a state court of last resort. Instead, the Eleventh Circuit's per curiam affirmance of the district court's order of dismissal applies and follows this Court's well-established jurisprudence on procedural due process.

Petitioners' private interest and disagreement with the adverse ruling by the Eleventh Circuit and the district court does not in and of itself warrant this Court exercising its discretionary review. This Court has long established that it will not grant certiorari review except in

cases of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeals. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). In this instant action, none of the criteria set forth in Rule 10 exists. Accepting jurisdiction of the instant action does nothing to insure uniformity of decisions among the circuit courts of appeals but instead would only serve the purpose of giving the Petitioners another opportunity for an appeal beyond the Court of Appeals for the Eleventh Circuit which affirmed per curiam the order of the district court and thereafter denied Petitioners' Motion for Rehearing and Rehearing en Banc.

As the decisions below are consistent with this Court's previous holdings including its most recent holding in *City of Los Angeles v. David*, 538 U.S. 715 (2003), it would serve no great or important public interest for this Honorable Court to accept certiorari review of this case. The decision below is an unpublished affirmance of a District Court's decision upholding the dismissal of Petitioners' Amended Complaint. It neither conflicts with any decisions of this Honorable Court nor creates any meaningful split of authority among the circuit courts of appeal. Nor does it present a question of great public importance.

Although the Petition may be of great importance to Petitioners and their belief that a grave injustice has been committed against them by an alleged conspiracy among code enforcement inspectors, it serves no general overall public purpose. Instead, the Petitioners' insistence that due process requires additional hearings on the issue of compliance after the initial determination of non-compliance by the CEB would only serve to impose upon

an efficient administrative process, unnecessary additional procedural steps without significant added benefits. This would make the code enforcement process unwieldy and potentially unworkable. Such would totally thwart the legitimate governmental interest in promoting, protecting and improving the health, safety and welfare of citizens in an equitable, expeditious, effective and inexpensive method of enforcing codes and ordinances and would be detrimental to public interest. Contrary to Petitioners' assertions, under the rules of this Honorable Court, plenary review is plainly unnecessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari jurisdiction should be denied.

Dated: July 12, 2004

Respectfully submitted,

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(4)

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No. 03-1545

In the

Supreme Court of the United States

STEPHEN WOLK and HELEN J. WOLK,

Petitioners,

v.

ORANGE COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE PETITIONERS IN REPLY

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I. THE PRESENCE IN THE STATUTORY/ORDINANCE SCHEME OF THE HEARING PROVIDED UNDER FS §162.07/OCC §11-35[1] FOR THE INITIAL DETERMINATION AS TO WHETHER A VIOLATION OF THE CODES EXISTS DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS BECAUSE, WHERE AN ORDER IS ISSUED CONDITIONALLY IMPOSING A FINE ON A PARTY UPON THAT PARTY'S FAILURE TO DO SOME ACT, DUE PROCESS REQUIRES A SECOND HEARING AS TO WHETHER OR NOT THAT PARTY IN FACT FAILED TO DO THAT ACT BEFORE THE FINE MAY BE IMPOSED.

Respondents base their argument that the instant decisions are not in conflict with precedent largely on the fact that a hearing is provided under the statutory/ordinance scheme pursuant to FS §162.07/OCC §11-35 relative to the initial determination of whether a violation of the codes exists on the owner's property (hereinafter, "the initial hearing"). They contend that this initial hearing satisfies all the requirements of due process with respect to a later imposition of fines and liens on the property owner pursuant to an order of the code enforcement board (hereinafter, "CEB") issued at that hearing, and makes the later imposition of fines and liens on the property owner without notice and hearing constitutionally permissible (CEB pp. 2, 3, 9, 14, 15; OC p. 11, 14[2]). This argument is contrary to procedural due process jurisprudence.

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[1] Petitioners will employ in this reply the same abbreviations as were used in the petition. References to Florida Statutes will be preceded by the abbreviation "FS" followed by the "§" sign and the number of the statute referred to as above. References to ordinances of the Orange County Code will be preceded by the abbreviation "OCC" followed by the "§" sign and the number of the ordinance referred to as above.

[2] Hereinafter, references to Orange County's brief in opposition to the

The scheme for code enforcement in question establishes a system wherein orders are issued at the initial hearing conditionally imposing a fine on the respondent property owner for failure to do some act in the future, i.e., to cause his property to be brought into compliance with the code(s) by a specified date. Where an order is issued conditionally imposing a fine on a party for that party's failure to do some act by a date in the future, due process requires that there be a second hearing afforded as to whether or not that party failed to do the specified act by the specified date before the fine may constitutionally be imposed on him. *See, e.g., Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990); *First Maryland Leasecorp. v. M/V Golden Egret*, 764 F.2d 749 (11th Cir. 1985).

In *Mercer*, a district court entered an order providing that, in the event that a jail population exceeded a stated cap, a fine of $100.00 for each prisoner in excess of the cap for each day that the cap was exceeded would be imposed on the defendant county. Later, based solely on a certification of the plaintiffs as to the population of the jail, the court imposed a fine on the county "in accordance with" its earlier order without holding a hearing. 908 F.2d at 766. On appeal by the county, the appellate court held that the imposition of the fine on the county without having afforded the county a hearing as to whether it had violated the court's earlier order violated the county's right to procedural due process. *Id.*

Similarly, in *Golden Egret*, a district court ordered the defendant to remove ship hulls from a shipyard by a certain date and provided for a daily fine in the event that the defendant failed to do so. Later, without holding a hearing, the court entered a second order imposing a fine on the

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petition will be made by the designation "OC" followed by the page number(s) of the page(s) of the brief where the referenced material appears as above. References to the Orange County Code Enforcement Board's brief in opposition will similarly be made by the designation "CEB" followed by the page number(s) of the page(s) of the brief on which the referenced material appears.

defendant for having failed to comply. The appellate court held that entry of the second order imposing the fine without allowing the defendant a hearing as to whether or not he had failed to comply with the court's earlier order violated the defendant's procedural due process rights. 764 F.2d at 759.

Thus, when the CEB, like the district courts in the above-cited cases, issues an order at the initial hearing conditionally imposing a fine on a respondent property owner for failure to have corrected alleged violations on his property by a date in the future, due process requires that the CEB, like those district courts, hold a second hearing to determine if the property owner in fact did not comply with its order before imposing the fine or lien. Therefore, the code enforcement scheme purporting to provide as it does for the imposition of fines and liens on a property owner for his alleged failure to have complied with the order of the CEB issued at the initial hearing without a second hearing to determine his asserted non-compliance renders that scheme unconstitutional on its face, and makes the imposition of a fine and lien on the property owner without notice and hearing pursuant to that scheme a violation of the owner's constitutional rights.

And this is really only common sense. The issue to be determined at the initial hearing pursuant to FS §162.07/OCC §11-35 is whether a violation of the codes exists on the owner's property. The issue that is determinative of the prospective deprivation posed by this statutory/ordinance scheme – the deprivation of money and interference with use of real property incident to the imposition of code enforcement fines – is whether the owner failed to correct those violations within the time provided by the CEB in its order issued at the initial hearing. Obviously, the initial hearing cannot be a hearing as to whether the owner complied with an order issued at that hearing to correct certain conditions on the property by some date in the future. Thus, while FS §162.07/OCC §11-35 do provide for an evidentiary hearing, it is not a hearing as to the issue that

is determinative of the deprivation at issue. Therefore, the presence of this hearing in the statutory/ordinance scheme is all but irrelevant to the issue at bar. At present, there is no hearing provided under the code enforcement scheme relative to the issue that is determinative of the deprivation of rights of the property owner posed by that scheme.

II. ONCE IT IS ESTABLISHED THAT A SECOND HEARING AS TO THE PROPERTY OWNER'S LIABILITY FOR FINES AND LIENS FOR ALLEGED CODE ENFORCEMENT VIOLATIONS IS REQUIRED, THE *MATHEWS* BALANCING TEST MAY NOT BE USED TO "BALANCE AWAY" THE PROPERTY OWNER'S RIGHT TO A HEARING ON THIS ISSUE ALTOGETHER.

Once it is realized that we are dealing here with the *complete absence* of a hearing required by due process, it becomes apparent why the lower court rulings in this case are a departure from previous Supreme Court jurisprudence on procedural due process rather than an extension of it as contended by the respondents. This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which the respondents claim to be subserved by the lower court rulings in this case, never altered the "root requirement" of due process that some form of hearing be afforded before an interest protected by the Fifth and Fourteenth Amendments[3] is divested. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). In fact, *Mathews* reaffirmed it:

> This Court consistently has held that some form of hearing is required before an

[3] All references to constitutional amendments in this reply are to the Amendments to the Constitution of the United States. Therefore, references to these amendments will be made by the number of the amendment only, *e.g.*, "the Fifth Amendment".

> individual is finally deprived of a property interest. *Mathews*, *supra*, 424 U.S. at 333.

What the *Mathews* decision *did* do was provide an analytical framework to be applied in cases where *some* form of hearing has been provided, and the question is whether the *nature and extent* of that hearing is sufficient to meet the requirements of due process in the factual circumstances of that case. In that context, the *Mathews* "balancing factors" are applied in order to make this determination.

Irrespective of any disparity in the relative weight of these factors, however, they can never be applied to "balance away" a party's right to a hearing otherwise required by due process altogether, and this is exactly what the lower court rulings did in this case: They applied the *Mathews* balancing factors to find that there was such a disparity between the weight of the interests of the COUNTY and the property owners that the property owners were not entitled to a hearing as to the propriety of imposing fines and liens for alleged code violations on them at all. This is completely inconsistent with any decision on procedural due process ever rendered by this Court.

Further, since the petition and briefs in opposition in this matter were filed, another Florida district court of appeal has joined the courts finding that imposition of fines and liens for alleged code enforcement violations on the property owner without notice and hearing pursuant to the procedure specified in FS §162.09(1) and OCC §11-37 does violate the procedural due process rights of the property owner. In *Wilson v. County of Orange*, 29 Fla. L. Weekly D1800 (Fla. 5th DCA 2004), the Florida Court of Appeal for the Fifth District reversed a circuit court's dismissal of a complaint under 42 USC §1983 wherein the allegations of the violation of constitutional rights were substantially identical to those in the instant case – that the CEB of the COUNTY had entered and caused to be recorded as a lien an order imposing fines on a property owner without notice and hearing pursuant to

the procedure provided in FS §162.09(1) and OCC §11-37. The court held that allegations, inter alia, that:

> ... [T]he County (1) procured the 'entry and recordation of CEB orders imposing fines and liens ... without a hearing'; (2) imposed fines and a lien based solely upon an affidavit; [and] (3) imposed excessive fines; ... (29 Fla. L. Weekly at D1801)

adequately stated a violation of the constitutional rights of the property owner sufficient to support a cause of action against the County under 42 USC §1983. *Id.*

III. THE DEPRIVATION IN QUESTION IS NOT A "TEMPORARY DEPRIVATION" AS THE LOSS OF MONEY POSED BY THE OBLIGATION TO PAY THE FINE IS PERMANENT, AND, EVEN IF IT WERE, "TEMPORARY" INTERESTS ARE EQUALLY AS ENTITLED TO DUE PROCESS PROTECTIONS AS PERMANENT INTERESTS.

The respondents echo the district court in asserting that the property interest of the petitioners deprived by the action of the COUNTY in the instant case is somehow entitled to less regard under due process analysis because it is "temporary" (CEB p. 11; OC p. 10). This argument both mistates the facts of the case and contravenes the law.

The characterization of the property interest of the petitioners deprived in the instant case as "temporary" ignores the fact that that deprivation consisted not only of the interference posed by the putative lien for code enforcement fines, but also of the money required to pay those fines (ultimately liquidated at $10,000.00). The petitioners' interest in the money required to pay this putative liability is also a property interest protected by the Fifth and Fourteenth Amendments. *City of Los Angeles v. David*, 538 U.S. 715,

718 (2003). The loss of the money required to pay this liability would be permanent. Thus, apparent on the facts of the case are both a temporary and a permanent deprivation effected by the COUNTY's actions.

This argument also ignores the existing law that, even if the interest in question were in fact only temporary, it would nevertheless be entitled to no less due process protection than permanent interests. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972):

> The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.[4]

In fact, this Court has specifically held a property owner's interest in holding his property free of liens to be an interest entitled to due process protection, notwithstanding its temporary nature. *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

IV. THE COUNTY'S CODE INSPECTOR IS NOT A "DISINTERESTED PARTY", NOR IS HIS

[4] This quote is particularly apt in pointing out the error of the district court and respondents in the instant case in applying principles intended to be used in determining the *extent* of the hearing required by due process to determine *whether* a hearing is required at all. Here, they have used the "fact" that the interest in question is, assertedly, temporary to conclude that the property owner is entitled to no hearing relative to its deprivation. In a case such as this where *no* hearing has been provided relative to the deprivation of an interest, application of this and other factors pertinent to the *Mathews* analysis should not even be reached.

FUNCTION UNDER THE CODE ENFORCEMENT SCHEME OF DETERMINING WHETHER THE PROPERTY OWNER COMPLIED WITH AN ORDER OF THE CEB WITHIN THE TIME ALLOTTED A "MINISTERIAL ACT".

The COUNTY argues that the lower court rulings in this case do not depart from existing law because this case is distinguished by the fact that the COUNTY is disinterested in the determination in question (OC p. 12). Fines determined to be payable as a result of a determination that a property owner has not complied with an order of the CEB are payable to the COUNTY. The COUNTY thus has a very direct tangible financial interest in an adverse determination. This means that the COUNTY certainly cannot be said to be "disinterested" in the code inspector's determination, and, if anything, that, under the second factor of the *Mathews* analysis, there is a heightened risk of an erroneous determination present in this case in comparison with other cases cited. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993):

> That protection [of an adversary hearing] is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. [Citations omitted.] (opinion of Scalia, J.) (slip op., at 19, n. 9) ('[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.')

An outlandish argument advanced by the respondents is a recitation of a concept developed by the district court in an effort to justify its ruling contrary to the law – that the determination by the COUNTY's code inspector as to whether the property owner had corrected the violations of the code(s) cited is a "ministerial act" (which therefore,

presumably, does not warrant review by a hearing since it could not have been decided any other way) (CEB pp. 2, 3, 9, 12, 14; OC pp. 11, 13). In law, a "ministerial act," is "an act in regard to which no discretion is committed to [the official required to perform it], and which, upon the facts existing, he is bound to perform ..." *Roberts v. United States*, 176 U.S. 221, 231 (1900). Thus, a ministerial act is one that involves no judgment at all in its performance, like filing a paper or computing interest. Aside from the fact that determining the function of a code inspector is "ministerial" is a factual determination that a district court is not permitted to make in ruling on a motion to dismiss (*See, e.g., Lopez v. First Union National Bank of Florida*, 129 F.3d 1186, 1189 (11th Cir. 1997), the function of the code inspector in evaluating myriad physical conditions as against many requirements of the pertinent codes obviously does not involve no judgment, and therefore is obviously not a ministerial act.

V. THE RIGHTS OF APPEAL AND OPPORTUNITIES TO PRESENT DOCUMENTARY EVIDENCE TO THE CEB ALLEGEDLY AVAILABLE TO THE RESPONDENT UNDER THE CODE ENFORCEMENT SCHEME MAY NOT BE DEEMED TO COMPENSATE FOR THE ABSENCE OF A HEARING AS TO THE PROPRIETY OF THE IMPOSITION OF FINES AND LIENS OTHERWISE REQUIRED BY DUE PROCESS.

Throughout their briefs, the respondents suggest that rights of appeal and supposed opportunities that the respondent has to bring motions and otherwise present documentary evidence to the CEB under the code enforcement scheme collectively "make up for" the lack of a hearing as to the imposition of fines and liens on the respondent required by due process (CEB pp. 2, 3, 10, 12, 16; OC pp. 13, 14, 16). Neither of these rights (assuming they in

fact exist) can be deemed to compensate for the lack of a required hearing under due process jurisprudence.

Rights of appeal have specifically been held by this Court not to compensate for absence of a hearing required by due process. *Goss v. Lopez*, 419 U.S. 565, 580, n. 10 (1975):

> Appellants point to the fact that some process is provided under Ohio law by way of judicial review. ... [This] is for two reasons insufficient to save inadequate procedures at the school level. First, ... the [appellate] proceeding is not *de novo*. [Citation omitted.] Thus, the decision by the school – even if made upon inadequate procedures – is entitled to weight in the court proceeding. Second, ... we must assume that delay will attend any [appellate] proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits.

As to the rights to bring motions and otherwise to get documentary evidence before the CEB that the respondents assert the property owner has, it is important to note that none of these is specifically provided for under the statutory/ ordinance scheme in question. Under principles long traditional to due process analysis, no rights not affirmatively set forth in the procedural scheme under analysis may be considered in evaluating its constitutional sufficiency. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 425 (1915):

> ... 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' ... 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' [Citations omitted.]

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Respectfully submitted,

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